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No. 14606

**United States
Court of Appeals
For the Ninth Circuit.**

**FRANK M. CHICHESTER, Trustee in Bank-
ruptcy for the Estate of KENNETH P.
SCHMIDT BUILDERS, INC., Bankrupt,**
Appellant,

vs.

**CLARENCE E. POLIKOWSKY, WINNIFRED
POLIKOWSKY, KENNETH P. SCHMIDT
and MARY WILKINS SCHMIDT,**
Appellees.

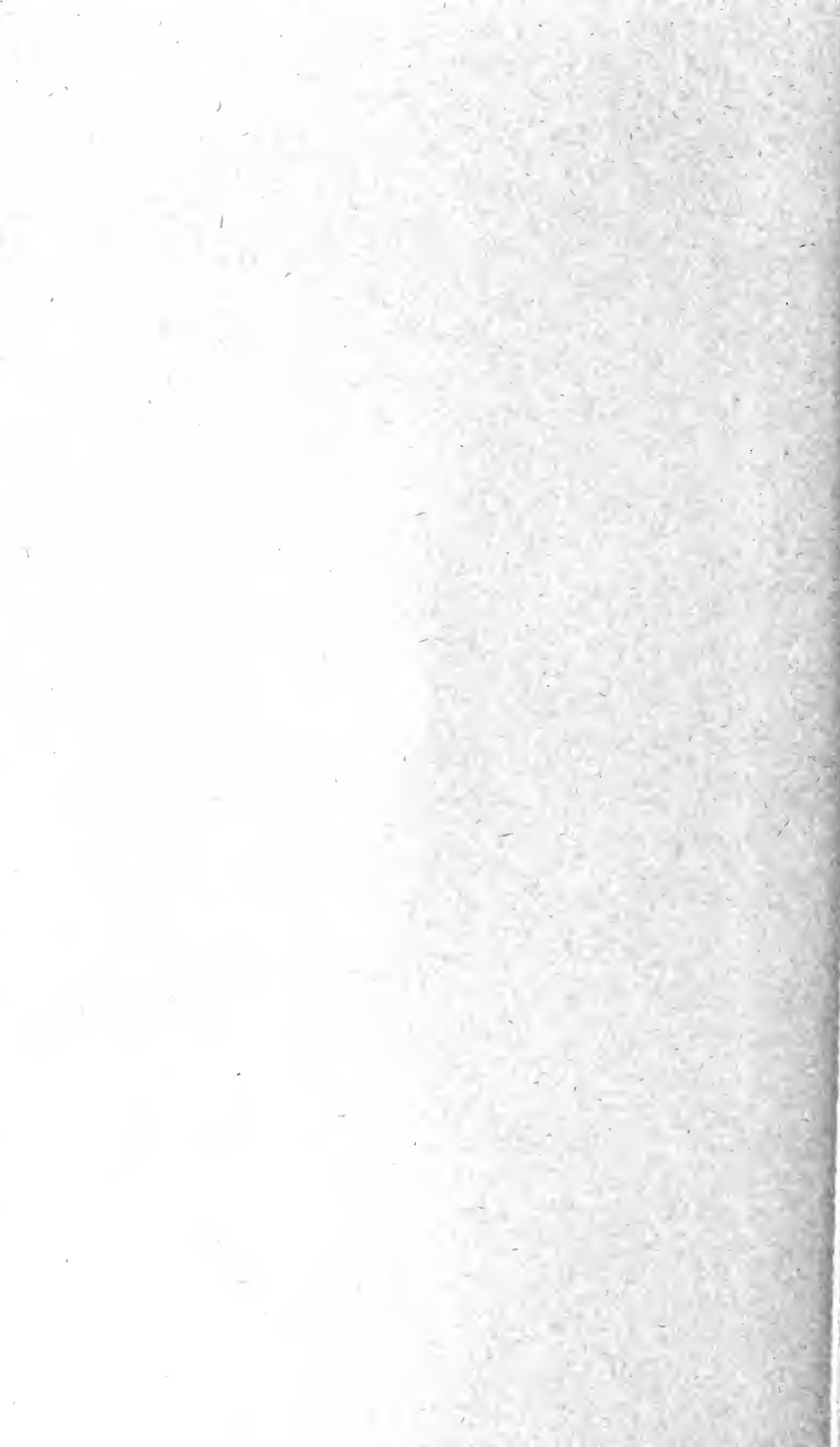
Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**

FILED

MAR 21 1955

PAUL P. O'BRIEN, CLERK



No. 14606

United States
Court of Appeals
For the Ninth Circuit.

FRANK M. CHICHESTER, Trustee in Bankruptcy for the Estate of KENNETH P. SCHMIDT BUILDERS, INC., Bankrupt,
Appellant,

vs.

CLARENCE E. POLIKOWSKY, WINNIFRED POLIKOWSKY, KENNETH P. SCHMIDT and MARY WILKINS SCHMIDT,
Appellees.

Transcript of Record

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Adjudication in Bankruptcy.....	8
Amended Petition for Review of Order of Referee	49
Answer to Petition for Order to Show Cause...	14
Answer of Kenneth P. Schmidt Builders, Inc., Kenneth P. Schmidt & Mary Wilkins Schmidt	17
Certificate of Clerk.....	201
Creditors' Involuntary Petition in Bankruptcy	3
Exhibits, Petitioner's:	
No. 1—Letter to Mr. and Mrs. C. E. Polikowsky, Dated October 5, 1952..	83
2—Letter to Mr. Kenneth P. Schmidt, Dated October 10, 1952.....	88
3—Escrow Instructions, Dated October 30, 1952.....	110
4—Amended E s c r o w Instructions, Dated December 5, 1952.....	113
5—Letter to Mr. and Mrs. C. E. Polikowsky, Dated October 24, 1952	159
6—Policy of Title Insurance and Trust Company	167

INDEX	PAGE
Findings of Fact, Conclusions of Law and Order on Petition in Reclamation of Clarence E. and Winnifred Polikowsky.....	38
Findings of Fact, Conclusions of Law and Order on Petition for Review of Order of Referee	63
Judgment on Petition for Review of the Order of Reuben G. Hunt, Referee.....	71
Memorandum Opinion Re Waiver of Vendor's Lien	20
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	74
Objections of Respondent Trustee to Findings Filed by Clarence E. and Winnifred Polikowsky	57
<small>RECEIVED</small> Petition for Review of Order of Referee.....	45
Petition in Support of Order to Show Cause..	9
Statement of Points on Appeal, Appellant's (U.S.D.C.)	75
Statement of Points and Designation of Record on Appeal, Appellant's (U.S.C.A.).....	203
Transcript of Proceedings of November 19, 1953	79
Witness:	
Schmidt, Kenneth P.	
—direct	80
—cross	102

INDEX

PAGE

Transcript of Proceedings of November 25, 1953	107
---	-----

Witness:

Lynn, Philip E.

—direct	107
---------------	-----

—cross	114
--------------	-----

Transcript of Proceedings of March 4, 1954...	125
---	-----

Witnesses:

MacArthur, H. T.

—direct	153, 179
---------------	----------

—cross	187
--------------	-----

—redirect	196
-----------------	-----

Schmidt, Kenneth P.

—direct	126
---------------	-----

—cross	135
--------------	-----

—redirect	139
-----------------	-----

—recross	144
----------------	-----

NAMES AND ADDRESSES OF ATTORNEYS

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For Appellees Polikowsky:

JOHN R. BLANCHE,
26 North Marengo Ave.,
Pasadena 1, Calif.

For Appellees Schmidt:

LAWRENCE M. CAHILL,
606 S. Hill St.,
Los Angeles 14, Calif.

In the District Court of the United States for
the Southern District of California, Central
Division

In Bankruptcy No. 57,339

In the Matter of:

KENNETH P. SCHMIDT BUILDERS, INC.,
Alleged Bankrupt.

CREDITORS' INVOLUNTARY PETITION
IN BANKRUPTCY

To the Honorable Judges of the District Court of
the United States, Southern District of Cali-
fornia:

The verified petition of Robert J. Keller, Orban
Lumber Company, a corporation, and E. A. Lynch,
respectfully show:

I.

That the alleged bankrupt, Kenneth P. Schmidt
Builders, Inc., now has, and has had his principal
place of business at 513-A South Atlantic Boulevard,
Monterey Park, California.

II.

That the alleged bankrupt is engaged in the busi-
ness of general contracting and construction.

III.

That the alleged bankrupt, Kenneth P. Schmidt
Builders, Inc., is now and at all times mentioned

herein and has been a corporation duly organized under and by virtue of the laws of the State of California.

IV.

That your petitioners are creditors of the said alleged bankrupt and hold provable claims against it, fixed as to liabilities [2*] and liquidated as to amount, amounting in the aggregate in excess of the value of securities held by them, to the sum of more than \$500.00.

V.

That your petitioner, E. A. Lynch, is the duly appointed, qualified and acting trustee in bankruptcy for the estate of Percy F. Bennett, d/b/a Bennett Roofing Company, a bankruptcy proceeding presently pending in the United States District Court for the Southern District of California, Central Division, being Bankruptcy No. 56,462-PH.

VI.

That the nature and amount of your petitioners' claims are as follows:

That the alleged bankrupt is indebted to your petitioner, Robert J. Keller, dba Keller Supply Co., in the sum of \$1635.32 as and for goods, wares and merchandise owing by said alleged bankrupt to your petitioner within four years last past of the reasonable market value of \$1635.32, no part of which has been paid, and the whole thereof is due, owing and unpaid; and that at all times herein mentioned, your petitioner, Robert J. Keller, dba

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Keller Supply Co., was an individual doing business under the fictitious name and style of Keller Supply Co.

The alleged bankrupt is indebted to your petitioner, Orban Lumber Company, a California corporation, in the sum of \$4136.13 as and for goods, wares and merchandise owing by said alleged bankrupt to your petitioner within four years last past of the reasonable market value of \$4136.13, no part of which has been paid, and the whole thereof is due, owing and unpaid; and that at all times herein mentioned, your petitioner, Orban Lumber Company, was, has been and now is a California corporation.

The alleged bankrupt is indebted to your petitioner, E. A. Lynch, in the sum of \$782.48 as and for goods, wares and merchandise owing by the said alleged bankrupt to your petitioner [3] within four years last past of the reasonable market value of \$782.48, no part of which has been paid, and the whole thereof is due, owing and unpaid; and that at all times herein mentioned, your petitioner, E. A. Lynch, was, has been and now is, as indicated hereinbefore, the duly appointed, qualified and acting trustee in bankruptcy for Percy F. Bennett, dba Bennett Roofing Company.

VII.

Your petitioners allege that the alleged bankrupt owes debts in excess of the sum of \$1000.00 and is insolvent at the present time and at the times mentioned hereinafter, and that the said alleged bank-

rupt has committed acts of bankruptcy as follows:

That the alleged bankrupt herein conveyed, transferred certain of its property with the intent to hinder, delay or defraud its creditors, or any of them. That among other alleged transfers and conveyances with intent to hinder, delay and defraud, your petitioners are informed and believe that the said alleged bankrupt caused to be transferred certain funds to its president, Kenneth P. Schmidt, which funds were invested in real property, and which your petitioners are informed and believe and therefore allege were invested in real property and a yacht for the purpose of preventing creditors attaching or reaching those funds or the property into which they were converted. Your petitioners are further informed and believe that Kenneth P. Schmidt caused the alleged bankrupt corporation to transfer other funds to him individually and personally belonging to the alleged bankrupt corporation so that the said funds would be beyond the reach of creditors of the alleged bankrupt.

Petitioners are further informed and believe and therefore allege that the alleged bankrupt herein transferred with intent to hinder, delay or defraud his creditors, or any of them, a race horse shortly prior to the commencement of this proceeding, which transferral was made without consideration or benefit to this [4] alleged bankrupt but for the purpose of placing the said asset beyond the reach of creditors pressing the bankrupt for payment and threatening attachment.

The alleged bankrupt has paid payments while

insolvent to one or more of its creditors with intent to prefer such creditors over other creditors.

Wherefore, your petitioners pray that the service of this petition, together with the subpoena, may be made upon the said alleged bankrupt as provided by the Bankruptcy Act, and that he may be adjudged by this Court to be a bankrupt within the purview of the said Act.

Dated: July 9, 1953.

ROBERT J. KELLER, dba
KELLER SUPPLY CO.,
By /s/ ROBERT J. KELLER.

ORBAN LUMBER COMPANY,
a Corporation,
By /s/ STANLEY L. HAHN,
Secretary.

E. A. LYNCH,
Trustee in Bankruptcy for the Estate of Percy F.
Bennett, dba Bennett Roofing Company,
By /s/ E. A. LYNCH.

CRAIG, WELLER &
LAUGHARN,
By /s/ C. E. H. McDONNELL,
Attorneys for Petitioning
Creditors.

Duly verified.

[Endorsed]: Filed July 10, 1953, U.S.D.C. [5]

[Title of District Court and Cause.]

ADJUDICATION IN BANKRUPTCY

The petition of Orban Lumber Company, a corporation; E. A. Lynch, Trustee in Bankruptcy for the Estate of Percy F. Bennett, dba Bennett Roofing Company, and Frank M. Chichester, Trustee in Bankruptcy for the Estate of Charles H. Abel, having been filed herein on July 10, 1953, that Kenneth P. Schmidt Builders, Inc., be adjudged a bankrupt under the Act of Congress relating to bankruptcy; and, thereafter, a petition under Section 321 of Chapter XI of the Bankruptcy Act having been filed herein; and on December 7, 1953, an order having been entered dismissing the said petition under Chapter XI and directing that the involuntary proceedings in bankruptcy be proceeded with; and the last day for filing an answer to the hereinbefore-set-forth petition of involuntary bankruptcy being November 30, 1953; and it appearing to the Court that service of the said involuntary petition and amendments thereof has been had upon the alleged bankrupt in the manner prescribed by law; and it further appearing that the said alleged bankrupt has not answered, or otherwise appeared to defend the said petition for involuntary bankruptcy but has defaulted therein; and the Referee being otherwise fully advised in the premises, [8]

It Is Ordered that Kenneth P. Schmidt Builders, Inc., be and it hereby is adjudged to be a bankrupt

under the Acts of Congress relating to bankruptcy.

Dated: December 7, 1953.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

[Endorsed]: Filed December 7, 1953. Referee.

[Endorsed]: Filed December 8, 1953. U.S.D.C.

[Title of District Court and Cause.]

PETITION IN SUPPORT OF ORDER TO
SHOW CAUSE

To the Honorable Judge of the Above-Entitled
Court:

Comes now Charles M. Fueller, on behalf of
Clarence E. Polikowsky and Winnifred Polikow-
sky, and respectfully represents as follows:

That said Charles M. Fueller is an attorney at
law and during the months of October and Novem-
ber, 1952, acted as attorney for said Clarence E.
Polikowsky and Winnifred Polikowsky in connec-
tion with the negotiations for the sale by said
Clarence E. Polikowsky and Winnifred Polikow-
sky to Kenneth P. Schmidt, Mary Wilkins Schmidt
and Kenneth P. Schmidt Builders, Inc., a Cali-
fornia corporation, of the real property hereinafter
described, and is familiar with the facts and cir-
cumstances of said negotiations.

That as a result of said negotiations, on or about

February 10, 1953, the said Clarence E. Polikowsky and Winnifred Polikowsky sold and transferred the hereinafter described real property to Kenneth P. Schmidt, Mary Wilkins Schmidt and Kenneth P. Schmidt [10] Builders, Inc., purchasers, and at their request made, executed and delivered to said purchaser their certain grant deed conveying the hereinafter described real property, and the grantee therein named was Kenneth P. Schmidt Builders, Inc.

That in consideration thereof and the only consideration therefor was the execution and delivery by the said purchasers, Kenneth P. Schmidt, Mary Wilkins Schmidt and Kenneth P. Schmidt Builders, Inc., was their certain promissory note in words and figures as follows, to wit:

\$20,000.00

December 5, 1952.

On or before 190 days after date, without grace, the undersigned promise to pay to the order of Clarence E. Polikowsky and Winnifred Polikowsky, his wife, as joint tenants at Pasadena, California, Twenty Thousand and no/100 Dollars in lawful money of the United States of America, with interest thereon, in like lawful money, at the rate of six per cent per annum from date until paid for value received. Interest to be paid at maturity and if not so paid, the whole sum of both Principal and Interest to become immediately due and payable, at the option of the holder of this note. And in case suit or action is instituted to collect this note or any portion thereof, undersigned

promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like lawful money, as the Court may adjudge reasonable, for Attorney's fees to be allowed in said suit or action.

[Seal] KENNETH P. SCHMIDT
BUILDERS, INC.,

By /s/ KENNETH P. SCHMIDT,
Pres.;

By /s/ MARY W. SCHMIDT,

/s/ MARY W. SCHMIDT,

/s/ KENNETH P. SCHMIDT.

Due December 5, 1952. [11]

which said promissory note was unsecured by deed of trust, mortgage or otherwise.

That no payments have been received on account of said promissory note and the same is wholly due, owing and unpaid.

That the said purchasers, Kenneth P. Schmidt, Mary Wilkins Schmidt and Kenneth P. Schmidt Builders, Inc., have not sold, transferred nor encumbered said real property, hereinafter described, to any purchaser or mortgagee for value without notice or otherwise, and as a result of said transaction the said Clarence E. Polikowsky and Winnifred Polikowsky are entitled to a vendor's lien upon said real property, hereinafter described, for the amount of said purchase price, to wit: \$20,000.00; and are entitled to have the same impressed upon said real property, said vendor's lien arising

by virtue of the provisions of Section 3046 of the Civil Code of the State of California.

That said real property is described as follows, to wit:

“That portion of Lot 1 in Tract 1032, in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in Book 17, Pages 142 and 143 of Maps, in the office of the County Recorder of said County, except that portion thereof described as follows:

“Beginning at a 4-inch pipe monument set at the most northwesterly corner of said Lot 1; thence north $82^{\circ} 22' 32''$ each along the northerly boundary line of said Lot 1, a distance of 18.85 feet to a 2 by 2 stake set at the northeasterly corner of said Lot 1, said corner being in the westerly line of Armada Drive, formerly San Rafael Drive, as said drive is shown on said map of Tract 1032; thence southerly along the said westerly line of Armada Drive, formerly San Rafael Drive, through an arc [12] concave easterly of $44^{\circ} 32' 36''$ having a radius of 135.06 feet, a distance of 105 feet to a 4-inch cement pipe monument set in said westerly line of Armada Drive; thence South $82^{\circ} 25'$ west a distance of 21.65 feet to a 4-inch pipe monument set in the westerly boundary line of said Lot 1; thence North $7^{\circ} 35'$ west along the said westerly boundary line of Lot 1, a distance of 102.32 feet to the point of beginning.”

Wherefore, your petitioner, on behalf of Clarence E. Polikowsky and Winnifred Polikowsky, respectfully requests the above-entitled Court that an

Order to Show Cause be issued direct to said Kenneth P. Schmidt, Mary Wilkins Schmidt and Kenneth P. Schmidt Builders, Inc., and to Frank M. Chichester, Trustee in Bankruptcy for said Kenneth P. Schmidt Builders, Inc., directing them to show cause, if any they have, why said vendor's lien should not be impressed upon said real property and why the above-entitled Court should not declare that they, the said Kenneth P. Schmidt, Mary Wilkins Schmidt and Kenneth P. Schmidt Builders, Inc., have no right, title nor interest therein or why said Clarence E. Polikowsky and Winnifred Polikowsky should not be permitted to bring an action in the courts of the State of California to impose said vendor's lien.

That said Charles M. Fueller, as attorney, makes this petition on behalf of said Clarence E. Polikowsky and Winnifred Polikowsky for the reason that said persons are absent from the County of Los Angeles.

Dated: This 22nd day of October, 1953.

/s/ CHARLES M. FUELLER,
Petitioner.

Duly verified.

[Endorsed]: Filed October 26, 1953, [13]
Referee.

[Title of District Court and Cause.]

ANSWER TO PETITION FOR
ORDER TO SHOW CAUSE

To the Honorable Reuben G. Hunt, Referee in
Bankruptcy:

Comes now Frank M. Chichester, and on behalf
of himself as Receiver and for no other person,
makes the following answer to order to show cause:

I.

The order to show cause of Clarence E. Polikowsky and Winnifred Polikowsky denies generally and specifically that on or about February 10, 1953, or any other time, or at all, petitioners Clarence E. Polikowsky and Winnifred Polikowsky, or either of them, sold or transferred any real property whatsoever, or at all to Kenneth P. Schmidt, Mary Wilkins Schmidt and Kenneth P. Schmidt Builders, Inc., or the said Kenneth P. Schmidt, Mary Wilkins Schmidt or Kenneth P. Schmidt Builders, Inc., requested the execution or delivery of a grant deed on any real property whatsoever, or at all, in the name of Kenneth P. Schmidt Builders, Inc. Respondent Chichester admits, however, that on or about February 10, 1953, Kenneth P. Schmidt Builders, Inc., and Clarence E. Polikowsky and Winnifred Polikowsky entered into an agreement whereby the said Polikowskys transferred certain real property, [15] more particularly described as follows:

“That portion of Lot 1 in Tract 1032, in the City of Pasadena, County of Los Angeles, State of Cali-

fornia, as per map recorded in Book 17, Pages 142 and 143 of Maps, in the office of the County Recorder of said County, except that portion thereof described as follows:

“Beginning at a 4-inch pipe monument set at the most northwesterly corner of said Lot 1; thence north $82^{\circ} 22' 32''$ each along the northerly boundary line of said Lot 1, a distance of 18.85 feet to a 2 by 2 stake set at the northeasterly corner of said Lot 1, said corner being in the westerly line of Armada Drive, formerly San Rafael Drive, as said drive is shown on said map of Tract 1032; thence southerly along the said westerly line of Armada Drive, formerly San Rafael Drive, through an arc concave easterly of $44^{\circ} 32' 36''$ having a radius of 135.06 feet, a distance of 105 feet to a 4-inch cement pipe monument set in said westerly line of Armada Drive; thence South $82^{\circ} 25'$ west a distance of 21.65 feet to a 4-inch pipe monument set in the westerly boundary line of said Lot 1; thence North $7^{\circ} 35'$ west along the said westerly boundary line of Lot 1, a distance of 102.32 feet to the point of beginning.”

To Kenneth P. Schmidt Builders, Inc., and that the said Polikowskys executed a grant deed at the instance of Kenneth P. Schmidt Builders, Inc., of the hereinbefore-described real property in favor of Kenneth P. Schmidt Builders, Inc.

II.

Respondent Chichester admits that on or about December 5, 1952, a promissory note in the sum of \$20,000.00, as set forth in the petition for order to show cause herein, was executed and [16] delivered

to Clarence E. Polikowsky and Winnifred Polikowsky as consideration for the purchase price of the hereinbefore-described real property and that the same was the only consideration for the said property; that the said promissory note is unpaid and the same is wholly due and owing.

III.

Respondent Chichester denies both generally and specifically that Kenneth P. Schmidt, Mary Wilkins Schmidt and Kenneth P. Schmidt Builders, Inc., have not sold, transferred nor encumbered the property hereinbefore described or embraced in the petition for order to show cause herein. Respondent Chichester admits that the said property has not been sold nor encumbered by the grantee, Kenneth P. Schmidt Builders, Inc.

IV.

Respondent Chichester denies that Clarence E. Polikowsky or Winnifred Polikowsky, either severally or collectively, have any vendor's lien on the property hereinbefore described for the amount of \$20,000.00, or for any other sum, or at all, by virtue of Section 3046 of the Civil Code of the State of California, or any other statutory provision, or in any other fashion, or at all.

Wherefore, respondent prays that the petitioners herein take nothing by virtue of their order to show cause and that the court issue an order denying a vendor's lien, or any other sort of lien whatsoever in favor of Clarence E. Polikowsky and/or Winnifred Polikowsky on the hereinbefore-de-

scribed real property, or any other assets of this debtor estate.

Dated: November 9, 1953.

/s/ FRANK M. CHICHESTER,
Receiver in Bankruptcy.

Duly verified.

[Endorsed]: Filed November 10, 1953, [17]
Referee.

[Title of District Court and Cause.]

ANSWER OF KENNETH P. SCHMIDT BUILD-
ERS, INC.; KENNETH P. SCHMIDT AND
MARY WILKINS SCHMIDT

Now come Kenneth P. Schmidt Builders, Inc., a corporation; Kenneth P. Schmidt and Mary Wilkins Schmidt (hereinafter designated as "Respondents") and answering the petition heretofore filed herein by Charles M. Fueller on behalf of Clarence E. Polikowsky and Winnifred Polikowsky, deny and allege as follows:

I.

Deny generally and specifically each and every allegation set forth therein except the allegation that they executed and delivered the promissory note described therein, which allegation is admitted to the extent and subject to the limitations hereinafter set forth; and except the allegations that said note is unsecured by deed of trust or mortgage, that no payments have been made thereon and that Charles M. Fueller is an attorney at law and rep-

resents said clients, which allegations are admitted.

II.

Further answering said petition, said respondents state that Kenneth P. Schmidt Builders, Inc., is a corporation that was engaged at all times stated in said petition in the business of buying lands; [19] the placing of construction loans thereon and the building of homes thereon for the purpose of sale by it to the general public, and that on or about December 5, 1952, it stated to said Clarence E. Polikowsky and the said Winnifred Polikowsky that it offered to purchase the lands described in said petition if same could be delivered to it free and clear of all encumbrances, including purchase price encumbrances; as it intended to borrow a large sum of money from a financial institution for the purpose of building ten (10) or more houses on said land and would be required by such financial institution to give it a first lien upon said property, and that it would pay for said lands by delivering its promissory note payable to them in the sum of \$20,000.00, and that it would pay said note at maturity either from borrowed sums of money or from monies received from the sale of said ten or more houses.

III.

That on or about December 5, 1952, the said Clarence E. Polikowsky and the said Winnifred Polikowsky stated to said Kenneth P. Schmidt Builders, Inc., that its offer was accepted provided that its unsecured promissory note, in the sum of

\$20,000.00, was executed also by Kenneth P. Schmidt and by his wife, the said Mary Wilkins Schmidt.

IV.

That thereafter, and on or about February 10, 1953, the promissory note described in said petition having been previously executed by all of said persons, it was delivered by said corporation to the said Clarence E. Polikowsky and the said Winnifred Polikowsky in exchange for the deed to the lands described in said petition, which deed, conveying said lands to Kenneth P. Schmidt Builders, Inc., was delivered by them to it on or about said day.

V.

That the said Clarence E. Polikowsky and the said Winnifred Polikowsky are not, and no one of them is, entitled to have a vendor's [20] lien, or any other lien, impressed upon said real property by virtue of Section 3046 of the Civil Code of California, or in any manner, or at all, and they have no right, title nor interest therein.

Wherefore, said respondents pray that petitioners be denied all relief prayed for in said petition; that said petition be dismissed, and for costs.

Dated: November 10, 1953.

/s/ L. M. CAHILL,

Attorney for Respondents.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 12, 1953, [21]
Referee.

[Title of District Court and Cause.]

MEMORANDUM OPINION RE WAIVER
OF VENDOR'S LIEN

Petition of Charles M. Fueller on behalf of Clarence E. Polikowsky and Winnifred Polikowsky to have a vendor's lien declared on certain real property of the estate located in Pasadena, Los Angeles County.

BLANCHE & FUELLER,
Attorneys for Petitioners.

CRAIG, WELLER & LAUGHARN,
Attorneys for Receiver.

LAWRENCE M. CAHILL,
Attorney for Kenneth P. Schmidt Builders, Inc.; Kenneth P. Schmidt and Mary Wilkins Schmidt.

I.

Statement of the Case

The above-entitled case is an involuntary bankruptcy proceeding commenced on July 10, 1953. On the same date Frank M. Chichester was appointed and qualified as Receiver in Bankruptcy. An adjudication in bankruptcy was entered on Dec. 7, 1953. In the previous Chapter XI proceedings, which failed, Frank M. Chichester was nominated as Trustee in Bankruptcy, and on December 9, 1953, he was appointed [23] and qualified as Trustee in Bankruptcy.

On October 26, 1953, Charles M. Fueller on behalf

of Clarence E. Polikowsky and Winnifred Polikowsky, filed a petition for the fixing of a vendor's lien upon certain real property of the bankrupt corporation located in Pasadena, Los Angeles County. Thereafter and on November 10, 1953, the said Frank M. Chichester, as such Receiver, filed an answer to the said petition opposing the allowance of such vendor's lien. On November 12, 1953, Kenneth P. Schmidt Builders, Inc., Kenneth P. Schmidt and Mary Wilkins Schmidt filed a similar answer to the said petition.

Hearings upon the issues raised by the said pleadings were held before the undersigned Referee in Bankruptcy on November 12, 19 and 25, 1953. The controversy was then submitted to the Referee for decision on briefs. The reporter's transcript of the hearing on November 19, 1953, was filed February 12, 1954, that of the hearing on November 25, 1953, on January 13, 1954, and that of the hearing on March 4, 1954, on March 9, 1954.

At the hearings of November 25, 1953, counsel for the respondents attempted to introduce parol evidence to add to the intention of the parties as disclosed by their contracts (original and amended escrow instructions). But the Referee refused to permit the introduction of such evidence upon the ground that the contracts were clear and explicit and there was no ambiguity or uncertainty with respect to them or any of their terms. In this the Referee was in error. The California law appears settled as follows:

In the interpretation of contracts the duty of the

court is to ascertain the intent of the parties. Although the language of the contract must govern its interpretation [24] (Civ. Code, Secs. 1638, 1639), nevertheless the meaning is to be obtained from the entire contract and not from any one or more isolated portions thereof. *Hunt v. United Bank & Trust Co.*, 210 C. 108, 115, 291 P. 184; *Kennedy v. Lee*, 147 C. 596, 601, 82 P. 257; *Eastman v. Piper*, 68 C.A. 554, 229 P. 1002; 13 C.J. 525. To assist in the performance of this duty the court may look to the circumstances surrounding the parties at the time they contracted (Civ. Code, Sec. 1647; *Ogburn v. Traveller's Ins.*, 207 C. 50, 53, 276 Pac. 1004; *Smith v. Carlston*, 205 C. 541, 550, 271 P. 1091; *Henika v. Lange*, 55 C.A. 336, 339, 203 P. 798), including the object, nature and subject matter of the agreement (6 R.C.L., pp. 836, 837; *Eastman v. Piper*, 68 C.A. 554, 229 P. 1002; *Canal v. Hill*, 82 U.S. 94, 100, 101, 21 L. Ed. 64), and the preliminary negotiations between the parties (6 R.C.L. p. 839), and thus place itself in the same situation in which the parties found themselves at the time of contracting. Code Civ. Proc., Sec. 1860; 6 R.C.L., p. 849; *Jersey Island Dredging v. Whitney*, 149 C. 269, 273, 86 P. 509, 691; *Blacholder v. Guthrie*, 17 C.A. 297, 300, 119, P. 524; *Lemm v. Stillwater Land & Cattle*, 217 C. 474, 480, 19 P. (2) 785; *Patterson-Ballagh v. Byron Jackson*, C.C.A. 9, 145 F. (2) 786; *Broome v. Broome*, 104 C.A. (2) 148, 231 P. (2) 171; *Berdan v. Berdan*, 39 C.A. (2) 482, 103 P. (2) 622; *Rhinehart v. So. Pac.*, SD Cal., 38 F.S. 79. In the case of *Lindsay v. Mack*, 5 C.A. (2) 491,

43 P. (2) 650, the court said: "The second exception to the parol evidence rule applicable here is clearly stated in *Greathouse v. Daleno*, 57 Cal. App. 187 (206 Pac. 1019) where it is said: 'A well-understood concurrent rule is, that where the parol evidence which is offered is entirely consistent with and in no way changes or contradicts the written instrument, such parol evidence may be admitted. (*Harrison v. McCormick*, 89 Cal. 327, 330, 23 Am. St. Rep. 469, 26 P. 830); [25] *Johnson v. D. H. Bibb Lumber Co.*, 140 Cal. 95, 73 P. 730.' " So, on February 23, 1954, the Referee of his own motion, reopened the matter to give both sides an opportunity to present any parol or other evidence that would be consistent with the rulings of these cited cases. Accordingly, a further hearing was held on March 4, 1954, and the matter was again submitted to the Referee for decision.

In their briefs, counsel for the petitioners contend that Kenneth P. Schmidt was the alter ego of the corporation, and that, therefore, he became an owner of the property as well as the corporation and that the property was acquired by him as community property and, therefore, the wife had a community interest therein, thus negating the effect of the third parties' signatures to the note of the husband and wife.

II.

Statement of the Evidence

The facts do not appear to be in dispute.

The bankrupt was a California corporation en-

gaged in the business of constructing homes on building tracts and selling them to the public. Kenneth P. Schmidt owned or controlled practically all of the capital stock of the corporation, and was its president. Mary Wilkins Schmidt is the wife of Kenneth P. Schmidt.

Prior to October 30, 1952, the Polikowskys listed the said real property for sale with H. T. MacArthur, a real estate broker. MacArthur's employee, William Duncan, contacted Kenneth P. Schmidt for the sale of the property. The latter never met or dealt with the Polikowskys. The said broker conducted on their behalf all negotiations for the sale of the property. The original escrow instructions, as first drawn, provided for completion bonds for the houses to [26] be built upon the tract by the bankrupt corporation, as well as bonds to guarantee the completion of the street and utility improvements upon the property. It developed that the bankrupt corporation was unable to furnish such completion bonds; and so the original escrow instructions were signed and delivered on October 30, 1952, by the parties with this completion bond provision deleted.

These original escrow instructions were delivered to Mutual Savings and Loan Association of Pasadena for the sale by Clarence E. Polikowsky and Winnifred Polikowsky to the bankrupt corporation of said real property for the purchase price of \$20,000.00. They provided that the Title Insurance and Trust Company of Los Angeles should issue a policy of title insurance showing title vested in the

bankrupt corporation free of encumbrances, except certain specified taxes and special district levies. This policy expressly stated that it did not cover liens which were not shown by the public records. The vendor's lien asserted here was not, of course, on the public records; a vendor's lien is created by law and not by the parties. The original escrow instructions also provided that a note for the purchase price and a deed of trust to secure its payment were to be executed and delivered to the sellers by the bankrupt corporation and Kenneth P. Schmidt personally, and that this trust deed would be subordinated to the lien of certain construction loans to be incurred by the buyer in making improvements on the property. Kenneth P. Schmidt, after the original escrow instructions were signed, contacted Mr. MacArthur and requested him to contact the Polikowskys for the purpose of amending the original escrow instructions by deleting the provision for the subordinated deed of trust so that the bankrupt corporation would get clear title to the property. In return for this Kenneth P. [27] Schmidt and his wife, Mary Wilkins Schmidt, would personally execute the note for the purchase price.

It appeared that the deal had to be handled this way or be cancelled. Later Mr. MacArthur notified Kenneth P. Schmidt that this request was acceptable to the Polikowskys. So the amended instructions of December 5, 1952, were prepared and signed. These eliminated the deed of trust provision in favor of the Polikowskys and provided that the

purchase money note should be signed individually by Kenneth P. Schmidt and Mary Wilkins Schmidt.

Pursuant to the original and amended escrow instructions, a promissory note for \$20,000.00 was executed and delivered to the petitioners by the corporation, and by Kenneth P. Schmidt and Mary Wilkins Schmidt, as co-signers; and the sellers executed and delivered a deed to the property vesting the title in the bankrupt corporation. This deed recited that the property is subject only to covenants, conditions, restrictions, reservations, rights-of-way and easements now of record, if any.

The note is wholly unpaid and title to the property is now vested in the said trustee in bankruptcy by operation of law.

The sellers knew that the bankrupt corporation was purchasing the property for the purpose of erecting homes thereon to be sold to the public; and that the corporation proposed to operate by placing construction loans on the property. This is evidenced by the original escrow instructions themselves which directly refer to such kind of loans, and which were not amended in this particular.

III.

Questions Presented

1. Were Polikowskys chargeable with the knowledge acquired [28] throughout the transaction by their agent, H. T. MacArthur?

2. Was the normal vendor's lien of the sellers under Sec. 3046 of the California Civil Code waived

by them accepting a note signed not only by the bankrupt corporation, the vendee, but also by two third parties who thereby as original makers of the note became severally bound to pay the same?

3. Was such vendor's lien waived by the provision in the escrow instructions that the title should be vested in the purchaser free of encumbrances, except taxes and special district levies; and also by the provision of the deed delivered to the bankrupt corporation which provided that the property was to be subject to certain matters without mentioning vendor's lien?

4. Is the corporation alter ego theory applicable here because Kenneth P. Schmidt owned or controlled all of the capital stock of the corporation?

5. Were Kenneth P. Schmidt and Mary Wilkins Schmidt joint purchasers of the property with the bankrupt?

IV.

Comment on the Law

1. The Seller Petitioners Were Chargeable With All the Information Acquired During the Transaction by Their Agent, H. T. MacArthur.

This proposition is fully supported by the authorities cited in Cal. Jur. (2) Vol. 2, p. 855.

2. The Sellers Waived the Vendor's Lien by Accepting a Note for the Purchase Price Signed Not Only by the Vendee Bankrupt Corporation, but Also by Two Third Parties.

It is not essential to the right to claim a vendor's

lien that an intention on the part of the vendor to create and retain unto himself the right to such lien should be expressly [29] declared. The right is given in equity and in law by the very nature of the transaction and consequently exists without regard to the express agreement of the parties. *Ferger v. Allen*, 35 C.A. 738, 170 P. 861.

A vendor's lien, however, may be waived by acts and conduct inconsistent with a continuing claim therefor. *Estate of Reed v. Reed*, 26 C.A. (2) 362, 79 P. (2) 451. When the lien is once waived it is gone forever. *Royal Consolidated Mining v. Royal Consolidated Mines*, 157 C. 737, 110 P. 123. In the case of *Finnell v. Finnell*, 156 C. 589, 595, 105 P. 740, the court said: "The question in this connection is not what were the secret thoughts or expectations of plaintiff as to whether he was to get this purchase money, but whether he had done any act or made any statement that manifested his intention to abandon any right given him by law to enforce his claim against the land, and to look solely to his father personally for payment, in other words, had he done or said anything that was inconsistent with the retention of a lien and amounted to a waiver thereof. As was said in *Moshier v. Meek*, 80 Ill. 79, speaking of such a lien, 'this lien, in equity, is created without the express agreement of the parties, and even when they do not know that such a lien exists or is created by operation of law.' " In *Houston v. Dickson*, 66 Tex. 79, 1 S.W. 375, the court, after saying that the lien may be waived by such facts as show that the vendor relies on other

security, or relinquishes his right to the security which the law gives him, said: "But the absence of knowledge that the law gives him such a security, or a mere secret intention not to claim it, does not affect the right."

In the case of *Jones v. Allert*, 161 C. 234, 118 F. 794, it was held that a vendor waives his lien upon real property by receiving a promissory note executed by third persons as security [30] for the balance of the purchase price due from the vendee. This principle of law prevails in other states. *Special Tax School Dist. v. Hellman*, 179 So. 805, 131 Fla. 725; *Rubendall v. Talla*, 119 P (2) 851, 190 Okla. 24; *Czelusnik v. Watroba*, 186 Ill. App 201; *Goldinger Realty v. Stehr*, 198 NYS 905, 207 App. Div. 832; *Bennett v. Murphy*, 108 NYS 231, 123 App. Div. 102, *aff'd*. 88 NW 1114, 195 N.Y. 553; *Jode v. Chedister*, 73 Tenn. (5 Lea) 346.

3. The Sellers Also Waived Their Lien by Agreeing That the Title Should Be Transferred Free of Encumbrances, Except Taxes and District Levies; and by Their Deed Which Made Reservations Without Mentioning a Vendor's Lien.

In the case of *Edison Securities v. Ventura Guarantee Building and Loan Association*, 10 C.A. (2) 555, 55 P. (2) 608 (rehearing denied by the Supreme Court), the vendor agreed to sell certain land to the vendee for the sum of \$45,000.00, payable \$5,000.00 upon the execution of the agreement, \$20,000.00 evidenced by the note of the vendee secured by a mortgage or deed of trust upon the land, and the remaining \$20,000.00 by the delivery

to the vendor of \$20,000.00 of certain investment certificates. Thereupon the vendor executed and delivered to the vendee a deed to the land. The \$5,000.00 cash was paid, the note and a deed of trust were executed and delivered together with the investment certificates. Thereupon, the vendor executed and delivered to the vendee a deed to the land. The note secured by the deed of trust was paid. \$15,000.00 of the investment certificates were redeemed. The vendor sued to recover the \$5,000.00 balance and asserted the right to a vendor's lien upon the land. The agreement of purchase provided that the escrow holder, a title company, should issue a guaranty of title, with a liability of \$45,000.00 showing title to be vested in the vendee, subject only to the said deed of trust, and, otherwise, to be free of all incumbrances [31] and rights, except as therein mentioned, there being no reservation therein of a vendor's lien. The court further held that the covenant that the vendee's title to the land should be free and clear of incumbrances except the deed of trust specified excluded the idea of the retention of a vendor's lien.

The Referee has examined the Clerk's transcript in that case. It contains a copy of the purchase agreement; and such agreement is similar to the one in the case here. In our case here the covenant is that the policy of title insurance shall show title vested in the bankrupt corporation, free and clear of all incumbrances except taxes and district levies. Counsel for the petitioners insist that since the title policy here expressly excludes liens not of

record, such as a vendor's lien, the clause "free of incumbrances" does not exclude an unrecorded vendor's lien. The purchase agreement here is not subject to any such construction any more than it was in the Edison Securities case. An intention to abandon a vendor's lien is manifested by the taking of a mortgage or trust deed for the purchase money. *Hunt v. Waterman*, 12 C. 301; *Wells v. Harter*, 56 C. 342, superseding 2 C.U. 52; *Lee v. Murphy*, 119 C. 364, 51 P. 549, 955. In our case here the original escrow instructions provided for the vendee, the bankrupt corporation, to give a subordinate deed of trust to secure the payment of the purchase price. The amended instructions dropped the deed of trust and substituted in its place the personal guarantee of the bankrupt's wife, Mary Wilkins Schmidt. There is nothing in these amended instructions to evince an intent to revive the vendor's lien so clearly excluded by the original instructions. While the mere execution and delivery by the vendor of a warranty deed, standing alone, would not prove [32] a waiver of the vendor's lien for the unpaid purchase price (*Couser v. Wilmoth*, Mo. App. 142 S.W. (2) 777), the deed in our case here expressly makes reservations as to certain matters of record, but no reservation or mention is made of any vendor's lien.

4. The Domination and Control of the Bankrupt Corporation by Kenneth P. Schmidt, Its Principal Stockholder, Did Not Make Him Its Alter Ego Under the Circumstances.

Counsel for the petitioners contend that by rea-

son of his stock control Kenneth P. Schmidt was practically the owner of the corporation and, therefore, the corporate veil should be pierced so that Kenneth P. Schmidt and the bankrupt corporation may be considered to be one with respect to the title to the property. Even though this be so, we still have to consider the effect of the signature of Mary Wilkins Schmidt to the note. If the real owner could be held to be Kenneth P. Schmidt, himself, then it might be said that Mary Wilkins Schmidt had a community interest therein since the property was acquired during their marriage. Counsel for petitioners rely upon the case of *Smith v. Schultz*, 23 Ida. 144, 129 P. 640, where the Court held that, if the property involved was community property, the wife's signature would not constitute security, but would be merely evidence of the community indebtedness or the signature of one of the purchasers. Counsel's theory is that the corporation and Schmidt were one, both were the purchasers, and the property acquired became the community property of Schmidt and his wife. This theory is untenable since in our case here there is no evidence that the purchaser was other than the bankrupt corporation.

Counsel overlooks the fact that the corporate veil will be pierced only to prevent inequity, fraud or injustice. In *Clark v. Millsap*, 197 Cal. 765, 242 P. 198, it was held that [33] it is a well recognized rule of law that a corporation will be considered a separate legal entity when used for the accomplishment of a legal purpose, but cannot be used as a

cover under which wrongs may be committed and fraud perpetrated. In such a case the Court will look through the form of the corporation to ascertain its actual purpose and intent. If the purpose and intent of the corporation is fraud or inequity, the corporate entity will not be a cover for wrongs, fraud and bad faith. In other words, proof that an individual owns all of the stock of a corporation and that the corporation is in truth and fact but the corporate double of the owner of the stock, will, in conjunction with the further showing that as a result of the double relationship, inequity or fraud, or injustice will inure to a third person, suffice to dissipate the separate identity of the corporation. *Minifie v. Rowley*, 187 C. 481, 202 P. 672; *Wenban Estate v. Hewlett*, 193 C. 675, 227 P. 723; *Gordon v. Aztec Brewing*, 33 C. (2) 514, 213 P. (2) 522; *Groether v. Meyer Rosenberg*, 11 C.A. (2) 268, 53 P. (2) 966. Where the alter ego theory is successfully invoked the individual is held to the same rules of accountability as the corporation, with respect to its acts and obligations. Petitioners here could have no further remedy than the one they have, even if the corporate veil were pierced. With Kenneth P. Schmidt's signature on the note he can personally be held liable for the corporation's obligations. Without such signature the case of *Goldberg v. Engleberg*, 34 C.A. (2) 10, 92 P. (2) 935, cited by petitioners might be in point.

The piercing of the corporate veil, therefore, would be an idle act and the law neither does nor requires an idle act. Cal. Civ. Code Sec. 3532. See

also *Asamen v. Thompson*, 55 C.A. (2) 661, 131 P. (2) 841; *Whitman v. Whittingham*, [34] 85 C.A. 140, 259 P. 63; *Minifie v. Rowley*, 187 C. 481, 202 P. 672; *Grother v. Rosenberg*, 11 C.A. (2) 268, 53 P. (2) 996.

Also the situation here is that no evidence has been presented to show that inequity, fraud or injustice would result from treating the bankrupt corporation as a separate legal entity from that of Kenneth P. Schmidt who owned or controlled its capital stock. By way of analogy, see *Wheeler v. Smith*, CCA 9, 13 ABR (NS) 253, 30 F. (2) 59, and *Finn v. Mickle*, CCA 9, 16 ABR (NS) 412, 41 F. (2) 676, where it was held that a claim against a bankrupt estate cannot be rejected merely because the claimant owned all of the capital stock of the bankrupt corporation. Counsel for the Polikowskys contend that an inequitable result so far as they are concerned would result if they cannot have a vendor's lien. But such a result here would be no different than in many other cases in bankruptcy where creditors recover little or nothing through their previous failure to take adequate and legal security in extending credit, when they had the opportunity to do so as these petitioners did here. The truth of the matter is that the Polikowskys would have been unable to sell the property to the bankrupt corporation if they had insisted upon a mortgage, or deed of trust, or other lien, to secure the purchase price. The bankrupt corporation could not have secured the necessary construction loans to build the contemplated houses on the land sold

if such security had been given, or if a vendor's lien existed unwaived. Furthermore, there is no evidence here to show that the Polikowskys may not eventually secure full recovery by recourse to the personal assets of Kenneth P. Schmidt and his wife, Mary Wilkins Schmidt, both of whom signed the purchase money note. Also, even though Kenneth P. Schmidt and his wife fail to pay the note when called upon to do so, the [35] final worthlessness of such security cannot militate against the fact that the acceptance and receipt of it by the vendors here worked a waiver of their vendor's lien. *Carter v. Garetson*, 56 C.A. 238, 204 P. 1090.

5. The Bankrupt Corporation Was the Sole Purchaser of the Property.

The sellers contend that the purchasers of the property were not only the bankrupt, but also Kenneth P. Schmidt and Mary Wilkins Schmidt. This argument is without merit. The sole purchaser designated in the escrow instructions is the bankrupt. The sole grantee in the deed is the bankrupt. The only relation of Kenneth P. Schmidt and Mary Wilkins Schmidt to the transaction was as co-makers of the note to give the sellers additional protection beyond the promise of the bankrupt. Their signatures were in the nature of a guarantee that the bankrupt corporation would fulfill its obligation.

V.

Conclusion

An intent to abandon a vendor's lien is not to be

presumed; the evidence of an intent to abandon or waive it should be clear and satisfactory. A vendor's lien may be defeated if the vendor does any act manifesting an intention not to rely on the land as security. *Slide and Spur Gold Mines v. Seymour*, 153 U.S. 509, 38 L. Ed. 802. This test is met here. The sellers manifested their intention to waive their vendor's lien by (1) the terms of the escrow agreement which required a title free of all encumbrances, except taxes, and the terms of the deed; and (2) the requiring of the security of the individual signatures on the purchase money note of Kenneth P. Schmidt and Mary Wilkins Schmidt.

The sellers, the Polikowskys, could have taken absolute security for the payment of the purchase price by way of a [36] first mortgage or trust deed. Instead they relied not only upon the bankrupt's obligation, but also upon the security given by the individuals, Kenneth P. Schmidt and Mary Wilkins Schmidt, who signed the note. It is significant that in the original escrow instructions the sellers were willing to take a deed of trust to secure the obligation which would be subordinate to construction loans, and that the amended instructions deleted this provision and required the personal signature to the note of not only Kenneth P. Schmidt, but also his wife, Mary Wilkins Schmidt. It seems apparent that if the sellers had required a mortgage or trust deed, or had not waived their vendor's lien and insisted upon it, there would not have been any sale because the bankrupt could not have operated with the land tied up in that way.

That we have correctly interpreted the intent of the parties in connection with their written instruments is clearly shown from the parol evidence received concerning their preliminary negotiations.

It follows, therefore, that the petition must be denied.

Counsel for the Trustee will prepare, serve and file appropriate findings of fact, conclusions of law and order pursuant to General Rule No. 7 of this Court.

This particular proceeding is being prosecuted by Attorney Charles M. Fueller on behalf of Clarence E. Polikowsky and Winnifred Polikowsky, the real parties in interest. Federal Rule of Civil Procedure No. 17a provides that every action shall be prosecuted in the name of the real party in interest. This is similar to Cal. Code Civ. Proc. Sec. 367. It was held in the case of *Babcock v. Mississippi River Power CCA* 7, 113 F. (2) 398, that "an action can be brought only by one having a real and actual interest in the subject matter, [37] and it is not enough for plaintiff to show a cause of action in some one else, and plaintiff must show that he personally has an enforceable right." It is obvious that the petitioners are appearing here improperly. Their attorney is not the real party in interest and has no real or actual interest in the subject matter of this litigation; he does not hold any enforceable right. The Referee has been informed that the trustee's counsel is willing to stipulate with counsel for the Polikowskys to the end that they be substituted as the parties here, so that this litigation will not be unduly delayed by the initiation of a

new proceeding for the same purpose with the Polikowskys as the petitioners. With this done, the order to be prepared pursuant to this opinion can reflect the changed situation.

Dated: March 25, 1954.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

[Endorsed]: Filed March 25, 1954, Referee. [38]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER ON PETITION IN
RECLAMATION OF CLARENCE E. AND
WINNIFRED POLIKOWSKY

This matter came on for hearing on the verified petition of Charles M. Fueller, filed on behalf of Clarence E. and Winifred Polikowsky, to fix a vendor's lien on certain real property standing in the name of Kenneth P. Schmidt Builders, Inc., a corporation, the bankrupt herein, which property is located in Pasadena, California, on November 12, November 19 and November 25, 1953, and the proceedings were then submitted to the Referee; that on February 23, 1954, this matter having been reopened by the undersigned Referee on his own motion for the taking of further testimony, and the trustee having appeared by and been represented through his counsel, Crag, Weller & Laugharn by

C. E. H. McDonnell, at all hearings, and the respondents Kenneth P. Schmidt and Mary Wilkins Schmidt having appeared by and been represented through their counsel, Lawrence M. Cahill, and the petitioners Clarence E. and Winnifred Polikowsky having appeared by and been represented through their counsel, Blanche and Fueller by Charles M. Fueller; and evidence both oral and documentary having been offered and [39] received, and the respondents hereto having stipulated in writing that the pleadings filed and signed herein by Charles M. Fueller on behalf of Clarence E. Polikowsky and Winnifred Polikowsky could be considered as filed and signed by the said individuals; and the Referee having taken the matter under submission on March 4, 1954, and being fully advised in the premises does now make the following Findings of Fact, Conclusions of Law and Order based thereon:

Findings of Fact

I.

The Court finds as true that at all times mentioned herein Kenneth P. Schmidt and Mary Wilkins Schmidt were and now are husband and wife; that the bankrupt was a California corporation engaged in the business of constructing homes on building tracts and selling them to the public. Kenneth P. Schmidt owned and controlled practically all of the capital stock of the bankrupt corporation and was its president and one of its directors. He dominated and controlled the corporation. These facts

were known to the Polikowskys, the respondents and real parties of interest herein.

II.

Prior to October 30, 1952, Kenneth P. Schmidt negotiated with the Polikowskys, through their agent, for the sale of the real estate herein involved by the Polikowskys to the bankrupt corporation. Originally, the bankrupt corporation agreed to supply completion bonds upon houses to be erected upon the said real property and to guarantee the street and utility improvements to be made therein by the bankrupt corporation, but the bankrupt corporation was unable to secure the said bonds so the sale proceeded with this portion of the agreement deleted.

III.

On October 30, 1952, an escrow was opened between the [40] Polikowskys, as sellers of the said real property, and the bankrupt as the buyer of the same, at the Mutual Savings and Loan Association of Pasadena (hereinafter referred to as "escrow holder") to accomplish the transfer of the said real property. On October 30, 1952, the Polikowskys and the bankrupt corporation and Kenneth P. Schmidt, individually, signed and filed with the escrow holder instructions setting forth the purchase agreement in writing as follows: The bankrupt corporation was to give its promissory note to the sellers in the sum of \$20,000.00, the said note also to be signed by the bankrupt corporation and Kenneth P. Schmidt, personally, and to be secured

by a second deed of trust on the said real property and the said second deed of trust to be subordinated to a trust deed later to be given by the bankrupt corporation and said real property to secure construction loans for the houses projected on the said real property. The sellers were also to furnish a title insurance policy showing title vested in the bankrupt corporation free of encumbrances except specified taxes and special levies. The said title policy was so furnished and provided. The said policy also stated that it did not cover liens which are not shown by the public record.

IV.

After October 20, 1953, it appearing that the transaction could not be completed upon the basis above mentioned, the Polikowskys and the bankrupt corporation amended on December 5, 1952, the said escrow instructions by deleting therefrom all mention of the second deed of trust to have been given to the Polikowskys as above stated and to substitute therefor the individual security of the signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt along with that of the corporation on the said promissory note for \$20,000.00. These amended instructions were signed by the Polikowskys and the bankrupt corporation and by Kenneth P. Schmidt and Mary Wilkins Schmidt, individually. [41] Pursuant to the said amended escrow instructions, a promissory note in the sum of \$20,000.00 was executed by the bankrupt corporation and by Kenneth P. Schmidt and Mary Wilkins Schmidt, in-

dividually, as co-signors and delivered into said escrow; and the sellers executed and delivered into said escrow a deed vesting title to the said real property in the bankrupt corporation, subject only to covenants, conditions, restrictions, reservations, rights of way and easements of record if any in the bankrupt corporation. Thereupon, the said escrow was closed, the said deed was delivered to the bankrupt corporation, and the said promissory note was delivered to the Polikowskys thus completing the transaction.

V.

Neither the whole nor any part of the said promissory note has ever been paid.

VI.

At none of the times herein mentioned was the bankrupt corporation used or intended to be used by the said Kenneth P. Schmidt as his alter ego or as a device to perpetrate any fraud, injustice or inequity.

Conclusions of Law

I.

The purchaser of the real property involved herein is Kenneth P. Schmidt Builders, Inc., the bankrupt corporation, and the signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt, individually, appear as co-makers on the note given by the corporation in consideration of the transfer of the said real property.

II.

That the bankrupt corporation is not the alter ego of Kenneth P. Schmidt, individually, and is a separate entity distinct from Kenneth P. Schmidt, even though he owned or controlled [42] practically all of the capital stock of the corporation and controlled and dominated its affairs.

III.

The vendor's lien asserted by the Polikowskys herein has been waived by the acceptance of the signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt as co-makers on the promissory note given as consideration for the transfer of the said real property.

IV.

The vendor's lien asserted herein by the Polikowskys has been waived by agreeing the title to the real property should be transferred free of encumbrances, taxes and district levies and by deed transferring title subject to reservations but not including a reservation of a vendor's lien.

V.

The vendor's lien asserted herein by the Polikowskys was waived by knowingly transferring title to the bankrupt corporation without encumbrance of record so that the said bankrupt corporation might use the said real property as the subject of other encumbrances to secure loans for the pur-

poses of construction on the said real property.

Now, Therefore,

It Is Ordered that the petition of Clarence E. Polikowsky and Winnifred Polikowsky in reclamation in the within proceedings be and the same hereby is disallowed, and it be and it hereby is fixed and determined that the following described real property is the property of this bankrupt estate free and clear of any claim in or to the said property on the part of or on behalf of the said Clarence E. Polikowsky and Winifred Polikowsky:

“That portion of Lot 1 in Tract 1032, in the City of Pasadena, County of Los Angeles, State of [43] California, as per map recorded in Book 17, Pages 142 and 143 of Maps, in the office of the County Recorder of said County, except that portion thereof described as follows:

“Beginning at a 4-inch pipe monument set at the most northwesterly corner of said Lot 1; thence north $82^{\circ} 22' 32''$ each along the northerly boundary line of said Lot 1, a distance of 18.85 feet to a 2 by 2 stake set at the northeasterly corner of said Lot 1, said corner being in the westerly line of Armada Drive, formerly San Rafael Drive, as said drive is shown on said map of Tract 1032; thence southerly along the said westerly line of Armada Drive, formerly San Rafael Drive, through an arc concave easterly of $44^{\circ} 32' 36''$ having a radius of 135.06 feet, a distance of 105 feet to a 4-inch cement pipe monument set in said westerly line of Armada Drive; thence south $82^{\circ} 25'$ west a distance of 21.65 feet to a 4-inch pipe monument set in the westerly

boundary line of said Lot 1; thence north 7° 35' west along the said westerly boundary line of Lot 1, a distance of 102.32 feet to the point of beginning."

Dated: May 11, 1954.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

[Endorsed]: Filed May 11, 1954, Referee. [44]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF ORDER
OF REFEREE

The petition of Clarence E. and Winifred Polikowsky respectfully represents:

To: Reuben G. Hunt, Esq., Referee in Bankruptcy.

I.

That your petitioners are the claimants concerning a certain vendor's lien in and to the real property hereinafter described.

II.

That heretofore your petitioners filed their petition praying for an order impressing a vendor's lien upon the hereinafter-described property upon the grounds and for the reason that pursuant to the provisions of Section 3046 of the Civil Code of the State of California in that said petitioners

sold said real property and have a lien thereon for the purchase price thereof unsecured otherwise than by the personal obligation of the buyer; that said petition was by said Referee denied and the following order was made, to wit:

“Now, Therefore,

“It Is Ordered that the petition of Clarence [45] E. Polikowsky and Winnifred Polikowsky in reclamation in the within proceedings be and the same hereby is disallowed, and it be and it hereby is fixed and determined that the following described real property is the property of this bankrupt estate free and clear of any claim in or to the said property on the part of or on behalf of the said Clarence E. Polikowsky and Winnifred Polikowsky:

“ ‘That portion of Lot 1 in Tract 1032, in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in Book 17, Pages 142 and 143 of Maps, in the office of the County Recorder of said County, except that portion thereof described as follows:

“ ‘Beginning at a 4-inch pipe monument set at the most northwesterly corner of said Lot 1; thence north $82^{\circ} 22' 32''$ each along the northerly boundary line of said Lot 1, a distance of 18.85 feet to a 2 by 2 stake set at the northeasterly corner of said Lot 1, said corner being in the westerly line of Armada Drive, formerly San Rafael Drive, as said drive is shown on said map of Tract 1032; thence southerly along the said westerly line of Armada Drive, formerly San Rafael Drive, through an arc concave easterly of $44^{\circ} 32' 36''$ having a radius of

135.06 feet, a distance of 105 feet to a 4-inch cement pipe monument set in said westerly line of Armada Drive; thence south $82^{\circ} 25'$ west a distance of 21.65 feet to a 4-inch pipe monument set in the westerly boundary line of said Lot 1; thence north $7^{\circ} 35'$ west along the said westerly boundary line of Lot 1, a distance of 102.32 feet to the point of beginning.' ''

III.

That said Order is erroneous for the following reasons: [46]

1. That there is no evidence to support the conclusion of the Referee that Kenneth P. Schmidt and Mary Wilkins Schmidt were not purchasing parties in said contract of sale.

2. That there is no evidence to support the finding of the Court that said Kenneth P. Schmidt and Mary Wilkins Schmidt were third party guarantors on the note executed and given in consideration of the transfer of the said real property.

3. That there is no evidence to support the finding of the Court that the bankrupt corporation was not used to perpetrate an injustice and inequity.

4. That there is no evidence to support the conclusion of the Referee that the bankrupt corporation should be regarded as a separate entity from Kenneth P. Schmidt in connection with the petition concerning the vendor's lien claimed herein.

5. That there is no evidence to support the finding of the Court that the vendor's lien of petition-

ers was waived by the acceptance of the signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt.

6. That there is no evidence to sustain the Referee's decision that said vendor's lien was waived by agreeing that the title to the real property should be transferred free of encumbrances, taxes and district levies.

7. That there is no evidence to support the finding of the Referee that the petitioners waived their vendor's lien by knowingly transferring title to the bankrupt corporation so that said bankrupt corporation might use the said real property as the subject of other encumbrances.

8. That the evidence does not sustain the judgment of the Court and the conclusions of law from the findings of the Court are in error.

Wherefore, your petitioners pray for a review of said Order by the Judge; that the said order be vacated and set aside and that [47] the vendor's lien of the petitioners herein be declared a good and sufficient vendor's lien.

Dated: This 18th day of May, 1954.

BLANCHE & FUELLER,

By /s/ JOHN K. BLANCHE,

Attorneys for Petitioners, Clarence E. and Winifred Polikowsky.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 19, 1954, Referee. [48]

[Title of District Court and Cause.]

AMENDED PETITION FOR REVIEW OF
ORDER OF REFEREE

To: Reuben G. Hunt, Esq., Referee in Bankruptcy.

The amended petition of Clarence E. and Winnifred Polikowsky respectfully represents:

I.

Your petitioners hereby incorporate and make a part hereof by reference for each and every purpose the petition for order for review of Referee heretofore filed on or about May 19, 1954.

II.

As a supplement and amendment thereto your petitioners point out with particularity and contentions in connection with said Referee's order and judgment, as follows:

1. There Is No Evidence to Support the Conclusion of the Referee That Kenneth P. Schmidt and Mary Wilkins Schmidt Were Not Purchasing Parties in Said Contract of Sale.

All of the evidence in connection with the identity of the purchasing parties is as follows: [50]

During the negotiations for purchase of the property Mr. Schmidt carried on his negotiations as an individual. (Rep. Tr. 11-19-53, page 4.) Mr. Schmidt—"A. Well, I think they actually believed they were dealing with myself as an individual." (Rep. Tr. 11-19-53, page 18.) "Q. As you recall it, at the

conclusion of the various negotiations you told Mr. MacArthur that it was desired that the property be taken in the name of the corporation? A. (Mr. Schmidt): Yes.”

The escrow instructions, Exhibit 3, were executed by Kenneth P. Schmidt, individually, and Kenneth P. Schmidt Builders, Inc., a corporation, as purchasers.

The escrow instructions of December 5, 1952, being petitioners Exhibit 4, provide for signatures by the corporation and Kenneth P. Schmidt and Mary Wilkins Schmidt, individually, but there was no execution by the corporation but only by Kenneth P. Schmidt and Mary Wilkins Schmidt, individually.

It is the contention of the petitioners that Kenneth P. Schmidt and Mary Wilkins Schmidt were purchasing parties and not merely guarantors.

“With respect to parties, contracts for the sale of real property are governed by substantially the same rules as other contracts.” 66 C.J.P. 512.

An accommodation party is one who has signed the instrument as a maker for the purpose of lending his name and credit to some other credit. 8 Cal. Jur. 2nd, P. 422.

“One who receives value for his signature on a note cannot set up the defense of accommodation.” 8 Cal. Jur. 2nd, P. 423.

In the hearing on March 4, 1954, Mr. Schmidt testified as follows:

(Rep. Tr. page 13) Mr. Schmidt “* * * All I did was spend several thousand dollars engineering the

map, and it is ready to record, the subdivision, but was never encumbered or to my knowledge [51] used as an asset in the corporation.”

The foregoing testimony indicates clearly that the Schmidts individually were interested in the purchase as they were jointly obligated on the escrow instructions which were the only written agreement between the parties, and they were interested in the purchase or Schmidt would not have spent several thousand dollars engineering, or if the money were corporate money he at least considered it his for all purposes. Upon the uncontradicted testimony of the president of the bankrupt corporation Schmidt and his wife were not third party guarantors.

2. There Is No Evidence to Support the Finding of the Court That Kenneth P. Schmidt and Mary Wilkins Schmidt Were Third Party Guarantors on the Note Executed and Given in Consideration of the Transfer of the Said Real Property.

There is no evidence in the record which indicates that Mary Wilkins Schmidt and Kenneth P. Schmidt did not receive any value for their signatures on the promissory note and on the face of the promissory note they were original makers.

The same testimony and reasoning indicating that the Schmidts were purchasing parties as hereinbefore set forth is here applicable.

3. There Is No Evidence to Support the Finding of the Court That the Bankrupt Corporation Was

Not Used to Perpetrate an Injustice and Inequity.

When a corporation is merely used as the convenient method of doing business and there is no attempt on the part of the sole stockholder to segregate the business of the corporation from his own he will not be heard to contend that he and the corporation are separate entities. *Goldberg vs. Engelberg*, 34 Cal. App. 2d 10.

In the present case there was no attempt to segregate the affairs of Schmidt from those of his solely owned corporation and an indication thereof is found in the hearing of 11-19-53 as follows:

(Rep. Tr., page 19) "Q. In connection with your operation [52] of the corporation it is a fact that you expended corporate moneys with reference to your own home; is that right, and subsequently transferred the home to the corporation? A. (Mr. Schmidt): Yes, sir."

The Referee, in his published opinion, stated that the consideration of the corporation as being the same thing as its sole stockholder would be an idle account inasmuch as, although Schmidt and his wife had signed the note and were liable thereon, it would not gain the vendor anything by having the corporation declared to be the alter ego of the corporation. Furthermore, the Referee does not apparently consider that any inequity or injustice results wherein a vendor is deprived of his property without payment therefor by reason of the ability of the purchasers to claim that one is a purchaser and the other a guarantor although the purchaser

and guarantor are one and the same. In other words, in this case the defense has raised the question of separate identity by claiming that the corporation and its sole stockholder are completely separate and by so doing are thus entitled to retain property not paid for and thus perpetrate an injustice and inequity which would otherwise not obtain. The cases in California in connection with the refusal to recognize the separate entity of a corporation and its sole stockholder when injustice or inequity would thereby result. Some of such cases are as follows:

Wenban Estate vs. Hewlett, 193 Cal., 675; 12 Cal. Jur. 2d 606; Gordon vs. Aztec Brewing Co., 33 Cal. 2d 514; Groether vs. Meyer Rosenberg, Inc., 11 Cal. App. 2d 268.

4. That There Is No Evidence to Support the Finding of the Court That the Vendor's Lien Was Waived by the Acceptance of the Signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt.

If all three persons executing the escrow instructions and executing the promissory note were the joint purchasers, or if by reason of the piercing of the corporate veil the Court finds in its [53] equitable jurisdiction that an inequity did result after separate entities were otherwise recognized, then Kenneth P. Schmidt and Mary Wilkins Schmidt were not the signatures of third parties and the lien of the vendor would not be waived by accepting them as co-makers upon a promissory note although the property was transferred to the

corporation only at the request of all of the purchasers. It seems unnecessary to cite authority to the effect that the community interest of Mary Wilkins Schmidt in the outcome of the corporate activities owned by her husband would constitute her an interested party rather than a disinterested third party.

5. There Is No Evidence to Sustain the Referee's Decision That Said Vendor's Lien Was Waived by Agreeing That the Title to the Real Property Should Be Transferred Free of Encumbrances, Taxes and District Levies.

The sellers agreed to convey a sufficient title to entitle vendees to procure a standard owners Title Insurance and Trust Company policy.

The standard owners Title Insurance and Trust Company policy which was procured by its very terms excepted liens and encumbrances not of record. Your petitioners respectfully petition this Court to introduce evidence to the effect that the standard owners policy of the Title Insurance and Trust Company as contemplated on October 30, 1952, provided for the exception of liens and encumbrances not of record. By its very terms a Vendor's lien is an implied lien and not one of record and is thus specifically excepted by the escrow instructions and the agreement to convey free and clear of record encumbrances, not being an agreement to convey free of encumbrances but merely that the record show the same to be free of encumbrances, does not constitute a waiver of the Vendor's lien.

6. There Is No Evidence to Support the Finding of the Referee That the Petitioners Waived Their Vendor's Lien by Knowingly Transferring Title to the Bankrupt Corporation [54] So That Said Bankrupt Corporation Might Use the Said Real Property as the Subject of Other Encumbrances.

There was no estoppel as a result of the transfer of the record title inasmuch as the corporation did not convey the property to any third person and no rights of intervening third persons ever accrued. (Rep. Tr. 3-4-54, page 12.)

The fact that the parties originally contemplated that vendors did accept a second deed of trust, subject to first deed of trust to be placed for corporation loan did not serve to waive the Vendor's lien inasmuch as the Vendors had not as yet received the lien and Vendors do not waive in advance a lien which they have not yet received until the property be transferred. *Maltby vs. Conklin*, 50 Cal. App. 201; *Finnell vs. Finnell* 156 Cal. 589.

7. The Evidence Does Not Sustain the Judgment of the Court and the Conclusions of Law From the Findings of the Court Are in Error.

It is the finding of the Referee that the Schmidts were husband and wife and that Schmidt owned and controlled practically all of the capital stock and dominated and controlled the corporation.

According to the uncontradicted testimony of the broker, Mr. Schmidt told the broker for the Polikowskys that he was the sole owner of the stock of the corporation. (Rep. Tr. 3-4-54, page 37.)

The Vendors were led to believe by the grantee

that there was no effectual difference between the corporation and the individuals and the corporation was merely a matter of form. Until the rights of the third parties intervened by reason of estoppel or otherwise, the Vendors are entitled to a lien for such portion of the purchase price that remains unpaid and otherwise unsecured unless they have specifically waived it in some manner. It is contended that there was no intent to waive the lien by any act of the Vendors, either by the acceptance of the note of the purchasers or otherwise, and that the petition of the Vendors should have been granted. [55]

Respectfully submitted,

BLANCHE & FUELLER,

By /s/ JOHN K. BLANCHE,
Attorneys for Petitioners Clarence E. & Winnifred
Polikowsky.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 29, 1954, Referee. [56]

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON PETITION FOR REVIEW OF ORDER OF REFEREE FILED BY CLARENCE E. AND WINNIFRED POLIKOWSKY

To the Honorable Harry C. Westover, Judge of the United States District Court:

Comes now Frank M. Chichester, by and through his counsel, Craig, Weller & Laugharn, respondent in the above-captioned matter, and does hereby make the following objections and suggestions to the Findings of Fact, Conclusions of Law and Order filed herein by Blanche & Fueller on behalf of Clarence E. and Winnifred Polikowsky:

I.

Respondent herein objects to Paragraph III of the Findings on the basis that the court's directions from the bench after argument specifically rejected the provisions set forth in the Findings proposed by the petitioners and refused to find or determine whether or not the Referee's findings on the question of the purchaser were correct or not. Accordingly, respondent suggests that the Finding of Fact number III should read as follows:

"On October 30, 1952, an escrow was opened between the Polikowskys, as sellers of the said real property, and [60] the bankrupt as the buyer of the same, at the Mutual Savings and Loan Association of Pasadena (hereinafter referred to as 'escrow

holder') to accomplish the transfer of the said real property. On October 30, 1952, the Polikowskys and the bankrupt corporation and Kenneth P. Schmidt, individually, signed and filed with the escrow holder instructions setting forth the purchase agreement in writing as follows: The bankrupt corporation was to give its promissory note to the sellers in the sum of \$20,000.00, the said note also to be signed by the bankrupt corporation and Kenneth P. Schmidt, personally, and to be secured by a second deed of trust on the said real property and the said second deed of trust to be subordinated to a trust deed later to be given by the bankrupt corporation and said real property to secure construction loans for the houses projected on the said real property. The sellers were also to furnish a title insurance policy showing title vested in the bankrupt corporation free of encumbrances except specified taxes and special levies. The said title policy was so furnished and provided. The said policy also stated that it did not cover liens which are not shown by the public record."

II.

Respondent objects to Paragraph IV of petitioners' suggested Findings because the uncontradicted written evidence indicates that the amendatory parties were actually Kenneth P. Schmidt Builders, Inc., and the petitioners here, otherwise the document of December 5, 1952, would be a nullity. On this basis, respondent submits that Finding number IV should read as follows:

"After October 20, 1953, it appearing that the

transaction could not be completed upon the basis above mentioned, the [61] Polikowskys and the bankrupt corporation amended on December 5, 1952, the said escrow instructions by deleting therefrom all mention of the second deed of trust to have been given to the Polikowskys as above stated and to substitute therefor the individual security of the signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt along with that of the corporation on the said promissory note for \$20,000.00. These amended instructions were signed by the Polikowskys and the bankrupt corporation and by Kenneth P. Schmidt and Mary Wilkins Schmidt, individually.”

III.

Respondent objects to Finding of Fact number VIII on the grounds that it attempts to establish the basis for a conclusion of law of an attempted determination as to an “alter ego” corporation. Respondent’s attorney, on argument, attempted to discuss this matter with the court and was informed that the court would make no determination whatsoever as to whether or not there was an alter ego corporation in this instance. The court at this time instructed and directed that its only findings and determination would be:

(1) That the purchaser of the property was not the bankrupt corporation. The court, in discussion with respondent’s counsel refused to determine that the purchasers were Kenneth P. Schmidt or his wife and stated that the court did not know and

would not find who the purchasers were but only that the corporation was not the purchaser.

(2) That since the corporation was not the purchaser, there was no jurisdiction in the bankruptcy court to determine this matter and that on that basis the [62] matter should be dismissed and the Polikowskys left to their rights in the state courts.

IV.

Respondent objects to Conclusions of Law II, III, IV and VII on the grounds that as set forth hereinabove the court specifically stated that it was making no determinations as to an "alter ego" corporation or as to any other facet of the case other than the jurisdictional question. In view of this, said Conclusions of Law II, III, IV and VII are completely erroneous since they would involve a reversal of all the Findings of Fact made by the bankruptcy Referee, and would necessitate rejecting the determination of the Referee on points of conflicting evidence.

V.

Respondent objects to Conclusions of Law number V on the grounds that there is no evidence whatsoever in the record on which to base such a finding.

VI.

Respondent objects to Conclusions of Law VI, VIII, IX and X on the grounds that the same are a reversal of the Referee's findings and conclusions based upon conflicting evidence. Furthermore, this

reviewing court indicated, in response to question from counsel for the respondent, that it was not making any determination on the question of vendor's liens, their existence or their waiver, and, indeed, refused to permit argument on this point saying that the whole question was one of jurisdiction. Therefore, respondent respectfully requests the rejection of Conclusions of Law VI, VIII, IX and X and in substitution therefor, in line with the court's direction which counsel for the petitioners have deliberately disregarded:

"That the court finds and concludes as a matter of law that the bankruptcy court had no summary jurisdiction over the property involved in this matter so as to [63] enable it to determine any questions as to the title or ownership thereof, or liens thereon."

VII.

Respondent objects to the "Order" prepared herein on the grounds that the same does not agree with the court's direction and voiced determination. It is respectfully suggested that the following order is in precise compliance therewith:

"It is ordered that the petition of the petitioners, Clarence E. and Winnifred Polikowsky, be and the same hereby is denied in part and allowed in part, and it be and hereby is fixed and determined that this bankruptcy court has no jurisdiction to determine questions of title or right in and to the following described real property:

"That portion of Lot 1 in Tract 1032, in the City of Pasadena, County of Los Angeles, State of Cali-

fornia, as per map recorded in Book 17, Pages 142 and 143 of Maps, in the office of the County Recorder of said County, except that portion thereof described as follows:

“Beginning at a 4-inch pipe monument set at the most northwesterly corner of said Lot 1 thence north $82^{\circ} 22' 32''$ each along the northerly boundary line of said Lot 1, a distance of 18.85 feet to a 2 by 2 stake set at the northeasterly corner of said Lot 1, said corner being in the westerly line of Armada Drive, formerly San Rafael Drive, as said drive is shown on said map of Tract 1032; thence southerly along the said westerly line of Armada Drive, formerly San Rafael Drive, through an arc concave easterly of $44^{\circ} 32' 36''$ having a radius of 135.06 feet, a distance of 105 feet to a 4-inch [64] cement pipe monument set in said westerly line of Armada Drive; thence south $82^{\circ} 25'$ west a distance of 21.65 feet to a 4-inch pipe monument set in the westerly boundary line of said Lot 1; thence north $7^{\circ} 35'$ west along the said westerly boundary line of Lot 1, a distance of 102.32 feet to the point of beginning.”

And, it is further ordered that the determinations here are without prejudice to any of the parties in further proceedings in other courts.

Respectfully submitted,

CRAIG, WELLER &
LAUGHARN,

By /s/ [Indistinguishable]

Attorneys for Respondent.

[Endorsed]: Filed August 26, 1954, U.S.D.C.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER ON PETITION FOR
REVIEW OF ORDER OF REFEREE

This matter came on for hearing on July 19, 1954, upon the petition of Clarence E. and Winnifred Polikowsky for review of the order of Referee Reuben G. Hunt, entered May 11, 1954, said petition being for the purpose of reviewing an order wherein said Referee denied a petition to fix a vendor's lien on said real property standing in the name of Kenneth P. Schmidt Builders, Inc., a corporation, the bankrupt herein, which property is located in Pasadena, California, the trustee having appeared by and having been represented through his counsel Craig, Weller & Laugharn, by C. E. H. McDonnell, and the respondents, Kenneth P. Schmidt and Mary Wilkins Schmidt, having appeared by and having been represented by and through their counsel Lawrence M. Cahill, and the petitioners, Clarence E. and Winnifred Polikowsky having appeared by and having been represented by Blanche & Fueller by John K. Blanche, and the Court having reviewed the evidence and the exhibits on file therein as set forth in the Referee's certificate and it appearing therefrom that the evidentiary facts are not in dispute; that the conclusions of the [66] Referee based upon the undisputed facts are incorrect and without support and it appearing to the Court that a grave injustice would result if the decision of the Referee were upheld; and the

Court being fully advised in the premises does now make the following findings of fact and conclusions of the law and order based thereon.

Findings of Fact

I.

The Court finds as true that at all times mentioned herein Kenneth P. Schmidt and Mary Wilkins Schmidt were and now are husband and wife; that the bankrupt was a California corporation engaged in the business of constructing homes on building tracts and selling them to the public. Kenneth P. Schmidt owned and controlled practically all of the capital stock of the bankrupt corporation and was its president and one of its directors. He dominated and controlled the corporation. These facts were known to the Polikowskys, the respondents and real parties of interest herein.

II.

Prior to October 30, 1952, Kenneth P. Schmidt negotiated with the Polikowskys, through their agent, for the sale of the real estate herein involved by the Polikowskys to the bankrupt corporation.

III.

On October 30, 1952, an escrow was opened between the Polikowskys, as sellers of the real property, and Kenneth P. Schmidt and Mary Wilkins Schmidt, as buyers of the same, at the Mutual Savings and Loan Association of Pasadena (herein-

after referred to as "escrow holder") to accomplish the transfer of the said real property.

On October 30, 1952, the Polikowskys and the bankrupt corporation and Kenneth P. Schmidt, individually, signed and filed with the escrow holder instructions setting forth a purchase agreement in writing which provided as follows: The buyers were to give a promissory note to the sellers in the sum of \$20,000.00 which note [67] was to be executed by the bankrupt corporation and Kenneth P. Schmidt, personally, which promissory note was to be secured by a second deed of trust on the said real property and which said second deed of trust was to be subordinated to a trust deed later to be given upon said real property to secure construction loans to be made by any savings and loan association for the construction of improvements on the property. The sellers also agreed to furnish a title insurance policy showing record title vested in the bankrupt corporation free of encumbrances, except specified taxes and special levies.

IV.

That thereafter, it appearing that the transaction could not be completed on the basis above mentioned, the Polikowskys and Kenneth P. Schmidt and Mary Wilkins Schmidt amended the purchase agreement on December 5, 1952, by deleting from said escrow instructions all mention of the second deed of trust which was provided to have been given to the Polikowskys, and to substitute therefor as consideration for the transfer of said real prop-

erty a promissory note in the sum of \$20,000.00, executed by the bankrupt corporation and by Kenneth P. Schmidt and Mary Wilkins Schmidt, individually. These amended instructions were signed by the Polikowskys and by Kenneth P. Schmidt and Mary Wilkins Schmidt but not by the bankrupt corporation.

V.

Pursuant to said amended escrow instructions a promissory note in the sum of \$20,000.00 was executed by the bankrupt corporation and by Kenneth P. Schmidt and Mary Wilkins Schmidt, individually, and delivered into said escrow; and the sellers executed and delivered into said escrow a deed vesting title to the said real property in the bankrupt corporation, subject to covenances, conditions, restrictions, reservations, rights of way and easements of record, if any. Thereupon the said escrow was closed, the said [68] deed was delivered to the purchasers, and the said promissory note was delivered to the Polikowskys.

VI.

Neither the whole nor any part of said promissory note has ever been paid, which promissory note, by its terms, became due on June 5, 1953.

VII.

The said real property has never since been transferred nor encumbered by the purchasers.

VIII.

That at all times herein mentioned the bankrupt corporation was under the control and domination of Kenneth P. Schmidt; that Kenneth P. Schmidt was the sole stockholder; that he requested the title to said real property herein mentioned to be placed in the name of the corporation for his personal convenience; that at all times herein mentioned the employees of the board of directors were employees of Kenneth P. Schmidt and were appointed by him as members of the board of directors of said bankrupt corporation and at all times held their membership at his sufferance and subject to his dismissal at any time; that at all times mentioned herein the officers of said bankrupt corporation were employees of said Kenneth P. Schmidt who held their offices at his sufferance and were subject to dismissal from their office at any time; that said Kenneth P. Schmidt commingled his funds and his real property with the funds and real property of the corporation; that the books and records of the corporation were loosely kept; that at no time prior to the filing of the bankruptcy proceedings did the real property appear upon the books of the corporation; that at the time of the transfer and prior thereto said Kenneth P. Schmidt represented to the petitioners, Clarence E. and Winnifred Polikowsky, that he and the corporation were one and the same and that he was the sole owner and stockholder therein. [69]

Conclusions of Law

As conclusions of law from the foregoing facts the Court finds as follows:

I.

The purchasers of the real property involved herein were Kenneth P. Schmidt and Mary Wilkins Schmidt and the title to the real property was placed in the name of the corporation for convenience only.

II.

That in this particular case equity requires that the separate entity of the bankrupt corporation and its individual owners be disregarded and that it be deemed, for the purpose of this transaction, that the transfer of said real property to said bankrupt corporation was actually a transfer of said real property to Kenneth P. Schmidt and Mary Wilkins Schmidt.

III.

That in order to protect the rights and equities of third parties and to prevent a grave miscarriage of justice, it is necessary that the separate corporate entity of the bankrupt and its individual owners be disregarded.

IV.

That Kenneth P. Schmidt and Mary Wilkins Schmidt are by their conduct estopped from asserting that the bankrupt corporation is a separate entity as distinguished from themselves as individuals.

V.

That no rights of innocent third persons have intervened as encumbrancers or purchasers and no facts are disclosed whereby said Clarence E. and Winnifred Polikowsky, the petitioners herein, are estopped from asserting or have waived their vendor's lien.

VI.

That it is not true that the purchaser of the real property [70] involved herein is Kenneth P. Schmidt Builders, Inc., the bankrupt corporation, and the signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt, individually, appear as co-makers on the note given by the corporation in consideration of the transfer of the said real property.

VII.

It is not true that the bankrupt corporation is not the alter ego of Kenneth P. Schmidt, individually, and is a separate entity distinct from Kenneth P. Schmidt, even though he owned or controlled practically all of the capital stock of the corporation and controlled and dominated its affairs.

VIII.

by the Polikowskys herein has been waived by the acceptance of the signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt as co-makers on the

That it is not true that the vendor's lien asserted

promissory note given as consideration for the transfer of the said real property.

IX.

That it is not true that the vendor's lien asserted herein by the Polikowskys has been waived by agreeing the title to the real property should be transferred free of encumbrances, taxes and district levies and by deed transferring title subject to reservations but not including a reservation of a vendor's lien.

X.

That it is not true that the vendor's lien asserted herein by the Polikowskys was waived by knowingly transferring title to the bankrupt corporation without encumbrance of record so that the said bankrupt corporation might use the said real property as the subject of other encumbrances to secure loans for the purposes of construction on the said real property.

Let Judgment Be Entered Accordingly.

Dated: This 30th day of September, 1954.

/s/ HARRY C. WESTOVER,

Judge of the United States
District Court.

Lodged August 19, 1954.

[Endorsed]: Filed September 30, 1954, U.S.D.C.

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy No. 57,339-HW

In the Matter of

KENNETH P. SCHMIDT BUILDERS, INC., a
Corporation,

Bankrupt.

JUDGMENT ON PETITION FOR REVIEW
OF THE ORDER OF REUBEN G. HUNT,
REFEREE

This matter came on for hearing on July 19, 1954, upon the petition of Clarence E. and Winnifred Polikowsky for review of the order of Referee Reuben G. Hunt, entered May 11, 1954, said petition being for the purpose of reviewing an order wherein said Referee denied a petition to fix a vendor's lien on said real property standing in the name of Kenneth P. Schmidt Builders, Inc., a corporation, the bankrupt herein, which property is located in Pasadena, California, the trustee having appeared by and having been represented through his counsel Craig, Weller & Laugharn, by C. E. H. McDonnell, and the respondents, Kenneth P. Schmidt and Mary Wilkins Schmidt, having appeared by and having been represented by and through their counsel Lawrence M. Cahill, and the petitioners, Clarence E. and Winnifred Polikowsky having appeared by and having been represented by Blanche & Fueller by John K. Blanche, and the Court having reviewed the evidence and the exhibits on file therein as set forth in the Referee's certifi-

cate and it appearing therefrom that the evidentiary facts are not in dispute; that the conclusions of the [72] Referee based upon the undisputed facts are incorrect and without support and it appearing to the Court that a grave injustice would result if the decision of the Referee were upheld; and the Court being fully advised in the premises and having filed herein its Findings of Fact and Conclusions of Law and Order based thereon, and having directed that judgment be entered in accordance therewith.

Now, Therefore, It Is Ordered, Adjudged and Decreed as Follows:

1. That the order of the Referee, entered May 11, 1954, be and the same is hereby set aside.

2. That the Findings of Fact and Conclusions of Law as set forth in the order of Referee Reuben G. Hunt, entered May 11, 1954, in the above-entitled matter, be and the same are hereby corrected and amended to conform to the Findings of Fact and Conclusions of Law as entered by this Court.

3. That Kenneth P. Schmidt Builders, Inc., a corporation, bankrupt herein, has no right, title nor interest in and to the following described real property, to wit:

That portion of Lot 1 in Tract 1032, in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in Book 17, Pages 142 and 143 of Maps, in the office of the County Recorder of said County, except that portion thereof described as follows:

Beginning at a 4-inch pipe monument set at

the most northwesterly corner of said Lot 1; thence north $82^{\circ} 22' 32''$ each along the northerly boundary line of said Lot 1, a distance of 18.85 feet to a 2 by 2 stake set at the northeasterly corner of said Lot 1, said corner being in the westerly line of Armada Drive, formerly San Rafael Drive, as said drive is shown on said map of Tract 1032; thence southerly along the said westerly line of Armada Drive, formerly San Rafael Drive, through an arc concave easterly of $44^{\circ} 32' 36''$ having a radius of 135.06 feet, a distance of 105 feet to a 4-inch cement pipe monument set in said westerly line of Armada Drive; thence south $82^{\circ} 25'$ west a distance of 21.65 feet to a 4-inch pipe monument set in the westerly boundary line of said Lot 1; thence north $7^{\circ} 35'$ west along the said westerly boundary line of Lot 1, a distance of 102.32 feet to the point of beginning.

4. That the real parties in interest and the real purchasers of said real property are Kenneth P. Schmidt and Mary Wilkins Schmidt [73] and subject to any rights of any persons not herein involved, said real property is owned by said Kenneth P. Schmidt and Mary Wilkins Schmidt and they are entitled to all right, title, interest and possession therein, subject to any rights therein which may hereafter be declared by a Court of competent jurisdiction in favor of the petitioners, Clarence E. Polikowsky and Winnifred Polikowsky.

5. It Is Further Ordered, Adjudged and Decreed that the petitioners, Clarence E. and Winnifred

Polikowsky, be and hereby are authorized and permitted to bring suit in the Courts of the State of California for the purpose of imposing their vendor's lien, if any they have.

6. It Is Adjudged that whereas said Kenneth P. Schmidt and Mary Wilkins Schmidt are not in bankruptcy; that this court has no jurisdiction to determine the validity of the vendor's lien of the petitioners herein as against said Kenneth P. Schmidt and Mary Wilkins Schmidt.

Dated: This 30th day of September, 1954.

/s/ HARRY C. WESTOVER,
Judge of the United States
District Court.

Lodged August 19, 1954.

[Endorsed]: Filed and entered September 30, 1954. [74]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Frank M. Chichester, trustee in bankruptcy for Kenneth P. Schmidt Builders, Inc., bankrupt, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the "Judgment on Petition for Review" entered in this matter on September 30, 1954.

CRAIG, WELLER &
LAUGHARN,

By /s/ C. E. H. McDONNELL,
Attorneys for Trustee.

[Endorsed]: Filed October 13, 1954. [75]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS
ON APPEAL

Comes now Frank M. Chichester, trustee in bankruptcy for Kenneth P. Schmidt Builders, Inc., a corporation, bankrupt, and presents herewith the points on which he intends to rely in support of his contention that the District Court erred:

1. In setting aside the order of the Referee in this matter entered May 11, 1954.

2. Ordering and directing that the Findings of Fact, Conclusions of Law of the Referee, entered May 11, 1954, be corrected and amended to conform with the Findings of Fact and Conclusions of Law entered by the District Court.

3. In holding and ordering that Kenneth P. Schmidt Builders, Inc., a corporation, the bankrupt herein, had no right, title or interest in and to the real property which was the subject of this litigation.

4. In holding and determining that the real parties of interest and the real purchasers of the real property involved in this litigation were and are Kenneth P. Schmidt and Mary Wilkins Schmidt and that Kenneth P. Schmidt and Mary Wilkins Schmidt are [78] the owners of the said real property and entitled to all right, title and interest therein and possession thereof subject to any rights therein which may thereafter be declared by a court of competent jurisdiction in favor of the petitioners, Clarence E. Polikowsky and Winnifred Polikowsky.

5. In adjudging that the bankruptcy court had no jurisdiction to determine the validity of the vendor's lien of Clarence E. and Winnifred Polikowsky in and to the subject real property.

6. In finding as a matter of fact that on October 30, 1952, an escrow was opened between Clarence E. and Winnifred Polikowsky, as sellers of the subject real property, and Kenneth P. Schmidt and Mary Wilkins Schmidt, as buyers of the said real property, at the Mutual Savings and Loan Association of Pasadena.

7. In finding as a matter of fact that the original escrow instructions involving this property were amended only by Kenneth P. Schmidt, Mary Wilkins Schmidt and Clarence E. and Winnifred Polikowsky.

8. In finding that upon the close of the escrow involving the subject property the deed thereto was delivered to Kenneth P. Schmidt and Mary Wilkins Schmidt and not to the bankrupt corporation.

9. In finding that as a matter of fact that Kenneth P. Schmidt requested the title to the real property which is the subject of this litigation be placed in the name of the bankrupt corporation for his personal convenience.

10. In finding that as a matter of fact the employees and officers of the Board of Directors of the bankrupt corporation were in fact the employees and officers of Kenneth P. Schmidt individually.

11. In finding that as a matter of fact that at the time of the transfer and prior thereto, Kenneth

P. Schmidt represented [79] to Clarence E. and Winnifred Polikowsky that he and the corporation were one and the same.

12. In concluding as a matter of law that the purchasers of the real property involved in this litigation were Kenneth P. Schmidt and Mary Wilkins Schmidt and that the title to the real property was placed in the name of the corporation for convenience only.

13. In concluding as a matter of law that the separate corporate entity of the bankrupt be disregarded.

14. In concluding that as a matter of law Kenneth P. Schmidt and Mary Wilkins Schmidt are by their conduct estopped from asserting that the bankrupt corporation is a separate entity distinct from themselves as individuals.

15. That the court erred as a matter of law in concluding that Clarence E. and Winnifred Polikowsky are not estopped from asserting their vendor's lien.

16. In concluding as a matter of law that Clarence E. and Winnifred Polikowsky have not waived their vendor's lien.

17. In concluding that as a matter of law that the purchasers of the real property involved is not Kenneth P. Schmidt Builders, Inc., the bankrupt corporation, and that the signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt do not appear as co-makers on the note given by the corporation in consideration of the transfer of the said real property, and that Clarence E. and Winnifred Poli-

kowsky have not waived their vendor's lien by the acceptance of the signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt as co-makers on the promissory note given as consideration for the transfer of the said real property.

18. In concluding as a matter of law that the vendor's lien has not been waived by Clarence E. and Winnifred Polikowsky but agreeing that the title to the real property should be transferred free of encumbrances, taxes and district levies and by a [80] deed transferring title subject to these reservations but not including the reservation of a vendor's lien.

19. In concluding as a matter of law that the vendor's lien herein was not waived by Clarence E. and Winnifred Polikowsky by knowingly transferring title to the bankrupt corporation without encumbrances of record so that the said bankrupt corporation might use the said real property as a subject of other encumbrances to secure loans for the purpose of construction on the said real property.

Dated: November 16, 1954.

CRAIG, WELLER &
LAUGHARN,

By /s/ C. E. H. McDONNELL,
Attorneys for Trustee.

[Endorsed]: Filed November 17, 1954. [81]

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy No. 57,339-W

In the Matter of

KENNETH P. SCHMIDT, INC., a Corporation,
Bankrupt.

REPORTER'S TRANSCRIPT OF PROCEED-
INGS AT CONTINUED HEARING ON
ORDER TO SHOW CAUSE, POLIKOWSKY
VS. RECEIVER

Appearances:

For Frank M. Chichester, Trustee:

CRAIG, WELLER & LAUGHARN, By
C. E. H. McDONNELL, ESQ.

For the Bankrupt Corporation, Kenneth P. and
Mary Wilkins Schmidt:

LAWRENCE M. CAHILL, ESQ.

For Clarence E. and Winnifred Polikowsky:

BLANCHE & FUELLER, By
CHARLES M. FUELLER, ESQ., and
JOHN K. BLANCHE, ESQ.

Frank M. Chichester, Trustee:

In pro per.

November 19, 1953, 10 A.M.

The Referee: In the matter of Kenneth P. Schmidt, Inc., order to show cause, Polikowsky against the Receiver.

Mr. Blanche: We would like to call Mr. Schmidt as an adverse witness.

The Referee: Under Section 21-J of the Bankruptcy Act?

Mr. Blanche: Yes, your Honor.

KENNETH P. SCHMIDT

called as a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

Direct Examination

By Mr. Blanche:

Q. Mr. Schmidt, you are connected with Kenneth P. Schmidt Builders? A. Yes, sir.

Q. In what capacity? A. President.

Q. That is a California corporation?

A. Yes, sir.

Q. Last summer you had some dealings with Clarence Polikowsky and his wife through a broker in connection with the sale of approximately five acres of land in Pasadena? A. Yes, sir.

Q. About when did those negotiations first take [2*] place?

A. I don't recall the dates. It has been some time ago. It has been a year ago, about.

Q. It was about a year ago? A. Yes, sir.

Q. At that time who did you talk to?

A. The broker, Mr. MacArthur.

(Testimony of Kenneth P. Schmidt.)

Q. In your conversations with him was there any discussion with reference to who the purchaser was?

A. Well, I don't actually recall. I approached him to buy the property, the broker. Do you mean as to how title would be vested at the early time of investigation?

Q. That is right.

A. Honestly I don't recall.

Q. Do you recall during the negotiations as to when the question or fact that the title was to be taken in the name of Kenneth P. Schmidt Builders, Inc., first came up?

A. No, I do not. When we had an understanding, when we got together on the deal, I told the broker that I would like to have title vested in the corporation because the corporation, the building project in Monterey Park—we wanted to build these particular houses in that particular corporation.

Q. Until the time you told the broker that you wanted title taken in the name of the corporation was there any statement made by you as to who the purchaser really was? [3]

A. I don't believe so. I think I was just representing that I was negotiating for the property, and we were agreed on the property. I said I would like to take title in the corporation. Now, that is to the best of my knowledge.

Q. Did you ever see any letters written by the broker to the Polikowskis in connection with this?

A. Yes, I did.

(Testimony of Kenneth P. Schmidt.)

Q. Did they refer to you individually rather than to the corporation?

A. I believe they were always looking to me individually because I guaranteed it as an individual.

The Referee: That is not the point, Mr. Schmidt. What did the letters say, if you remember?

The Witness: Well, I think they actually believed they were dealing with myself as an individual.

The Referee: That is not a sufficient answer. What did the letters say, sir? That is what I want to know.

The Witness: I don't recall.

The Referee: All right.

Mr. Cahill: Do you have the letters, counsel?

The Referee: We have not identified the name of the broker in the record.

Mr. Blanche: I don't believe so, not yet, your Honor.

Mr. Cahill, here is a copy of the letter (handing document to counsel). [4]

Mr. Cahill: Thank you, sir.

Mr. Blanche: I will show the witness a copy of a letter dated October 5th.

The Referee: What year?

Mr. Blanche: 1952, your Honor.

Q. Mr. Schmidt, do you recall having seen a letter similar to that or to the same tenor and effect?

A. Yes. I recall having seen one.

Mr. Blanche: I would like to offer this, if the Court please.

(Testimony of Kenneth P. Schmidt.)

The Referee: Is there any objection?

Mr. Cahill: It is a copy. Do you have the original?

Mr. Blanche: I believe the Polikowskis have it possibly up in Happy Camp. I don't know where it is.

Mr. Cahill: We will waive objection, your Honor.

Mr. Blanche: This is a letter dated October 5, 1952, from Harold T. McArthur to Mr. and Mrs. C. C. Polikowski.

The Referee: That will be Petitioners' Exhibit 1.

(The letter dated October 5, 1952, was marked Petitioners' Exhibit 1.)

PETITIONER'S EXHIBIT No. 1

October 5, 1952.

Mr. and Mrs. C. E. Polikowsky,
Box 41,
Happy Camp, California.

Dear Mr. and Mrs. Polikowsky:

We have submitted your 5½ acres located at Armada Drive and Prospect Boulevard to a well-known local builder whom you may know, Mr. Kenneth P. Schmidt.

Mr. Schmidt builds homes on a large scale. For instance, you may recall the great number of homes he built on the west side of the arroyo north of Devil's Gate Dam near the Flintridge Country Club. He is now building several hundred homes south

(Testimony of Kenneth P. Schmidt.)

of the old Midwick Country Club grounds near Garvey and Fremont Avenues. He has been engaged in other large building ventures also, and has supplied us with references to submit to you as his proposition is somewhat unusual.

He has made us the following verbal offer and we have agreed to write you giving the details rather than to attempt to draw up a formal offer at this stage:

(1) He agrees to the price of \$21,500 provided you are agreeable to waiting six months for your money plus 6% interest beginning 30 days from the date of opening the escrow;

(2) He will put up a \$15,000 Bond as a means of guaranteeing completion of the subdividing of the land including installation of the street, sewer lines and utilities within that period;

(3) He has arranged for financing for the erection of homes on the various lots to be created, this financing to be handled by Mutual Savings and Loan Association, Colorado Street near Garfield Ave.; the exact amounts of the respective loans would necessarily be determined at a later date, but he does business with them and has assurance of financing through their Mr. Caspers;

(4) You would receive a blanket second trust deed loan in the amount of \$21,500.00, due in six months plus the 6% interest, the note to be subject

(Testimony of Kenneth P. Schmidt.)

to the various first loans; this loan would be the only loan temporarily, but by agreement would become subordinate to the first loans as they are created and release clauses would apply to the various lots during the six months period on payments of agreed amounts on your note so that he would be in a position to dispose of properties in the interim;

(5) Mr. Schmidt merely asks at this time for us to find out whether or not you are willing to wait six months for your money on such a plan, realizing that the legal details would have to be worked out to the satisfaction of both buyer and seller as to the bond, etc.;

(6) If you are agreeable to this general plan, subject to your approval of the workings out of matters referred to in the above paragraph (5), then he asks that he first be given one week of time to hire his engineers to study the land and make contacts with the City of Pasadena in order to determine a close estimate of the total cost to subdivide as the only estimate we have so far is \$10,000 exclusive of the cost for underground wiring; if the cost were to run \$15,000, for instance, then he would not be interested in the price of \$21,500. But he does not want to go to all the time and expense of determining what it would cost him to do all this work if you were not to be interested in his plan of purchase in the first place.

I have discussed this manner of purchase with my own attorney, but I have never handled a deal of

(Testimony of Kenneth P. Schmidt.)

this plan. Mr. Schmidt evidently has handled deals in this manner before and when he was told of your great amount of building experience, he stated that you would probably be more familiar with the plan than I am. Also, that the plan depends to a very considerable extent upon who the buyer is including general reputation. Mr. Harrison Baker's name came up in the conversation and he asked that Mr. Baker's name be mentioned as a reference thinking that you two probably know him also. Mr. Baker is the Baker of Harrison-Baker Company, realtors and long-time subdividers, located on Green Street just west of Los Robles. You most probably also know Mr. Caspers previously referred to.

We assume that you have your own attorney in Pasadena to handle the legal matters in case you tentatively approve the deal. If not, I can recommend our attorney, Mr. Charles M. Fueller, for such a case.

I realize very well that it is difficult to handle this proposition by mail. You would not receive any cash for a maximum of six months from the time of opening an escrow covering all items in detail. Apparently, we would have to wait that long for our commission fee, too, which is o.k. Mr. Schmidt is the type that acts fast and would have to do so to arrange for subdividing per requirements of the City and Sacramento, but apparently is in a position to agree to the six months due date anyway.

If you write us accepting such a proposition contingent upon your full satisfaction of the workings

(Testimony of Kenneth P. Schmidt.)

out of the legal details, then neither of you are to be regarded as definitely committed at that point, but it will permit Mr. Schmidt to get busy with his engineers for one week in estimating costs already mentioned. I hesitate to advise a trip to Pasadena in this regard until there are further developments.

Kindest personal regards,

HAROLD T. MacARTHUR.

HTM:t

Received in evidence November 19, 1953.

Q. (By Mr. Blanche): Mr. Schmidt, I show you copy of a letter dated October 10, 1952, addressed to you.

The Referee: From whom?

Mr. Blanche: From Harold T. McArthur, your Honor.

Q. Do you recall having received the original of that letter, Mr. Schmidt? [5]

A. I can't actually that I do, but I know Mr. McArthur gave me a copy of everything that transpired.

Q. This letter apparently is directed to you?

A. Well, it seems familiar.

The Referee: Will you speak a little louder, please?

Q. (By Mr. Blanche): You don't know where

(Testimony of Kenneth P. Schmidt.)

the original of this letter is? A. No, I do not.

Q. To the best of your recollection you did receive such a letter? A. Yes, sir.

Mr. Blanche: We will offer this letter, if the Court please.

The Referee: Petitioners' Exhibit 2. This is signed by H. T. McArthur, addressed to Mr. Schmidt, dated October 10, 1952.

(The letter referred to was marked Petitioners' Exhibit 2.)

PETITIONER'S EXHIBIT No. 2

October 10, 1952.

Mr. Kenneth P. Schmidt,
513-A South Atlantic Blvd.,
Monterey Park, California.

Re: Land at Armada Drive & Prospect Blvd.

Dear Mr. Schmidt:

We have received a letter from Mr. C. E. Polikowsky in reply to our letter dated October 5th, his letter reading as follows:

Happy Camp (California)
October 8, 1952.

Dear Mr. MacArthur:

Received your letter. I know of Mr. Kenneth P. Schmidt and that he is reputably and financially o.k. I will agree to paragraph (5) of your letter, also as to price, and time of payment.

Sincerely yours,

/s/ C. E. POLIKOWSKY.

(Testimony of Kenneth P. Schmidt.)

It is the understanding that you have a copy of the letter referred to above as being dated October 5th. Mr. W. W. Duncan has asked that you be supplied with the above exact copy of Mr. Polikowsky's reply dated October 8, 1952. Although all of the parties concerned realize that so far only preliminary points have been worked out, we feel very much encouraged by Mr. Polikowsky's reply letter as there are few people he would consider dealing with on such a plan of purchase.

Very truly yours,

H. T. MacARTHUR.

HTM:t

CC:WWD

Received in evidence November 19, 1953.

Q. (By Mr. Blanche): About how long after these negotiations were carried on did you come to a meeting of the minds and actually go to escrow, do you recall?

A. Perhaps 30 days, 30 or 60 days.

Q. Do you recall the escrow instructions and how they were signed?

A. I don't recall, but I believe they were put in the name of or drawn in the name of the corporation. [6]

Q. As a matter of fact, didn't you sign individu-

(Testimony of Kenneth P. Schmidt.)

ally and as president of the corporation on all escrow instructions? A. I don't recall.

Mr. McDonnell: Just a moment, your Honor.

The Referee: Do you want to make an objection?

Mr. McDonnell: Yes, your Honor.

The Referee: The answer will go out.

Mr. McDonnell: It seems to me the escrow instructions would be the best evidence of what the documents were that were signed.

The Referee: That is true.

Mr. Blanche: They should be here. As a matter of fact, counsel, don't you have copies that were furnished to you by the Mutual Building & Loan?

Mr. McDonnell: I don't know. The Receiver may have received them. I don't have a copy.

Mr. Blanche: The Mutual Building & Loan told me they sent copies. I saw their file and I assumed you had a full and complete file of all the escrow instructions.

The Referee: You did not request the Receiver to produce them, did you?

Mr. Blanche: No, your Honor, but I would like permission at the conclusion of the hearing to have those produced by subpoena. As a matter of fact I just obtained a subpoena for that purpose. [7]

The Referee: Very well.

Q. (By Mr. Blanche): In connection with the affairs of the corporation, you carried on all of these negotiations with the McArthur Company and the Polikowskis yourself with reference to the purchase of this property, did you not? A. Yes, sir.

(Testimony of Kenneth P. Schmidt.)

Q. You arrived at a situation where the promissory note executed by you, Mrs. Schmidt and the corporation would be the sole consideration. Is that right?

The Referee: Is that admitted in the pleadings?

Mr. Blanche: I think so.

The Referee: I think that is in the amended pleadings. There was a note given which was dated December 5, 1952, for \$20,000, payable on or before 90 days after date signed by Kenneth P. Schmidt Builders, Inc., by Kenneth P. Schmidt, President, and Mary W. Schmidt, and also the individual signature of Mary W. Schmidt. Go ahead.

The Witness: To answer the question, the corporation executed a note and the note was guaranteed and endorsed by Mrs. Schmidt and myself, to the best of my knowledge.

The Referee: Did you sign it individually?

The Witness: I think we guaranteed the note for the corporation.

The Referee: That is right, Kenneth P. Schmidt signed individually, as well as Mary W. Schmidt.

The Witness: Guaranteeing the corporation's note. [8]

Mr. Blanche: I object to that.

The Referee: What is that?

Mr. Blanche: I object to the use by Mr. Schmidt of the word "guaranteeing."

The Referee: There is nothing here to indicate a guarantee. They apparently signed as co-makers.

(Testimony of Kenneth P. Schmidt.)

Mr. Blanche: Mr. Schmidt is drawing a legal conclusion.

The Referee: He is doing the best he can. He is not a lawyer and he would not understand those things.

Q. (By Mr. Blanche): Who are the Board of Directors of the Kenneth P. Schmidt Builders, Inc., a California corporation?

A. Kenneth P. Schmidt and Kenneth Bohard.

Q. Kenneth who?

A. Kenneth Bohard is secretary.

The Referee: He asked for the Board of Directors. How many are there?

The Witness: Correct me if I am wrong, but I believe there are two on the Board of Directors.

The Referee: Only two on the Board of Directors?

The Witness: Yes, sir.

The Referee: Have you stated who they are?

The Witness: Yes, your Honor.

Q. (By Mr. Blanche): Who are the officers of the corporation? [9]

Mr. Cahill: The question is objected to unless it is limited as to time. The important thing would be who were the directors and who were the officers at that time. There might have been three or four or five directors or officers at that time.

Mr. Blanche: I beg your pardon.

Q. Has there been any change, Mr. Schmidt?

A. I don't recall who the directors were at that

(Testimony of Kenneth P. Schmidt.)

time. I know I was president. I don't know who the officers were. I can only guess.

The Referee: When you say at that time, are you referring to the date of December 5, 1952?

The Witness: Yes, sir.

Q. (By Mr. Blanche): Do you know who the stockholders were at that time?

A. There has been only one stockholder, and that is myself.

Q. Do you own all of the stock of the corporation? A. Yes, sir.

Q. There was a permit issued to permit you to issue certain stock to members of the Schmidt family and your children. Was that permit ever followed through or are you the sole stockholder?

The Referee: The statement of affairs prepared by Mr. Cahill and filed herein on behalf of the debtor, Subdivision 15, gives you all of that information. If you would care to [10] look at it you may do so. That may be received in evidence.

Mr. Blanche: I would like to see it.

The Referee: You may read it into evidence.

Mr. Blanche: This refers to officers but not to stockholders.

The Referee: It is supposed to. I thought it did.

Mr. Blanche: I believe that is so.

The Referee: You might have to ask him about it. I will read it into the record. In answer to Subdivision 15 in the Statement of Affairs filed September 22, 1953, where it says, "The names, titles or offices held, addresses of officers, directors and ex-

(Testimony of Kenneth P. Schmidt.)

ecutives, of each stockholder holding 25 per cent of the issued and outstanding stock of the corporation," the answer is as follows:

"Kenneth P. Schmidt, President (Acted as General Manager)"—apparently about 80 per cent stockholder, and his address is given.

"Mary Schmidt was Vice President for about one month in 1953." There is no statement about her stock interest, if any.

"Lucille Clark, Vice President." No statement about any stock interest which she may have.

"Kenneth Bohard, Secretary and Treasurer after January 5, 1953." There is no statement about any stock interest.

"Stan W. Schmidt, Secretary and Treasurer, resigned January 5, 1953." [11]

Go ahead, counsel.

Q. (By Mr. Blanche): Mr. Schmidt, do you recall whether or not Mary Schmidt was an officer of the corporation in October, 1952?

A. No. I believe the facts are just as the Judge has recited them. Mr. Cahill checked on our corporation before the report was issued. She was an officer for approximately 30 days.

Q. You will note in December she executed a note, as I understand it, on behalf of the corporation as Secretary. Is that right?

A. I do not recall.

Q. You don't know whether or not she was secretary at that time?

A. She was never secretary.

(Testimony of Kenneth P. Schmidt.)

The Referee: We have the corporate minutes. Perhaps we can save time here by looking at them.

The Witness: She was never secretary.

The Referee: Who has the corporate minutes? Do you have them, Mr. McDonnell, or does the Receiver have them?

Mr. Cahill: Mr. Chichester has them.

Mr. McDonnell: Mr. Chichester, the Receiver, has them.

The Referee: We will have them at the next hearing. We will have all of the corporate records then so that we can determine the matters with regard to the Board of [12] Directors and the stockholders.

Q. (By Mr. Blanche): Do you recall whether any meeting of the Board of Directors was had in connection with the purchase of this property?

A. There was a resolution in the records.

Q. In the corporate records there is a resolution?

A. Well, I am guessing when we had her borrow the money.

The Referee: We should have those records here and not call upon Mr. Schmidt for his recollection.

Q. (By Mr. Blanche): Do you recall of your own recollection at this time when this matter was actually presented to any of the Board of Directors?

Mr. Cahill: That would be immaterial if he recalls or doesn't recall. There is a record of it in the minute book.

The Referee: I think we will get along better if we have the records here.

(Testimony of Kenneth P. Schmidt.)

Mr. Blanche: I can furnish that information this afternoon if the Court desires it.

The Referee: I will give you an opportunity to prove it, but let's proceed as far as we can.

Mr. Blanche: Does the Court desire to continue this?

The Referee: I am ready to go on.

Mr. Blanche: I would like to go ahead at this time.

The Referee: When can you get the escrow [13] here?

Mr. Blanche: I can have it here at 2 o'clock.

The Referee: I have another calendar. I don't know how long it will take. Why not do this? If there is nothing more you can do this morning without the records why not continue it until 3 o'clock. I am pretty sure I will be ready at that time.

Mr. Cahill: It will inconvenience me. I have set appointments all during the afternoon on a matter coming before Judge Dickson.

The Referee: When could you be available?

Mr. Cahill: At any continuance, your Honor, that you make after today. I have the Newport matter coming up before Judge Dickson Monday.

Mr. Blanche: I will be glad to submit the escrow records and the corporation records for what they may be worth without the necessity of a further hearing.

The Referee: I don't think it will make a complete record. I think you had better do it the other way. Is there anything else you can cover this morning?

(Testimony of Kenneth P. Schmidt.)

Mr. Blanche: Yes. Notwithstanding the corporate records, I would like to go into how the control of this corporation was handled.

The Referee: Shouldn't we get the records first?

Mr. Blanche: I don't think it is necessary.

The Referee: Very well. Try the case your own way.

Q. (By Mr. Blanche): As a matter of fact, Mr. Schmidt, [14] were you not the dominant head of the corporation for all purposes?

Mr. Cahill: Just a moment, if your Honor please. I don't know what dominant head means.

The Referee: I think it calls for a conclusion.

Mr. Blanche: This is an adverse witness.

The Referee: You can get at it in another way. You can ask what actually happened.

Q. (By Mr. Blanche): Mr. Schmidt, were there actual meetings of the Board of Directors to decide upon the purchase of properties or entering into contracts or anything of that sort, regularly held?

A. We did have a meeting on this particular property and the decisions were made by myself as president, and Kenneth Bohard, who was secretary and treasurer, and who was also general superintendent. We inspected the properties very carefully and we did have a directors' meeting on buying this particular property.

Q. Does Kenneth Bohard own any stock in the corporation? A. No, sir.

Q. He is your superintendent?

A. That is correct.

(Testimony of Kenneth P. Schmidt.)

Q. He is employed by you?

A. He was at that time.

Q. He was employed by you or by the corporation, [15] which? A. By the corporation.

The Referee: Were you the general manager of the corporation as is set forth in the Statement of Affairs?

The Witness: Yes, sir.

The Referee: Did you have the power to hire and fire employees?

The Witness: Yes, sir.

The Referee: Was Mr. Bohard under your supervision?

The Witness: Yes, sir.

The Referee: As general manager? Is the answer yes?

The Witness: Yes, sir.

Q. (By Mr. Blanche): As far as you recall, the only two persons who conferred in connection with this property were you and Mr. Bohard, is that right, as a Board of Directors?

A. No. There was one other, Lucille Clark, who was also secretary of the corporation at one time, or a director.

The Referee: What is her name again?

The Witness: Lucille Clark. She worked for the corporation as bookkeeper.

Q. (By Mr. Blanche): Did she own any stock in the corporation? A. No, sir.

The Referee: Was she hired by you?

The Witness: Yes, sir.

(Testimony of Kenneth P. Schmidt.)

The Referee: According to the Statement of Affairs she [16] was vice president at one time. Do you know how long she occupied that position?

The Witness: At least six months, your Honor.

The Referee: Between what dates?

The Witness: I don't recall the dates.

The Referee: All right, go ahead.

Q. (By Mr. Blanche): She was the secretary who acted as secretary or stenographer in the offices of the corporation, is that correct?

A. Bookkeeper.

Q. During such time she was appointed on the Board of Directors; is that right?

A. That is correct, yes.

Q. When did her employment terminate, do you have any recollection?

A. I think it was in April or May, 1953.

Q. When her employment terminated did she automatically resign as an officer and director at or about that time?

A. I don't recall. We had some financial difficulties in the corporation. I don't recall whether the resignation and the acts were turned in in the minutes or not.

Q. To all intents and purposes, as soon as she terminated she was no longer a director?

A. That is right.

Q. Or an officer? [17] A. That is right.

Q. Whether you went through the actual, specific forms of setting it up correctly on the books,

(Testimony of Kenneth P. Schmidt.)

she never acted after terminating her employment, as a director or officer? A. That is correct.

Q. Isn't it true, Mr. Schmidt, throughout all the period of time during the year 1952 and the year 1953 all the members of the Board of Directors who may have been there were there at your sufferance, they were subject to removal by you at any time?

A. That is correct I would say.

The Referee: All except your wife, but the others were your employees.

Q. (By Mr. Blanche): Their offices as directors were incidental? A. That is correct.

Q. To their other employment, is that correct?

A. Yes, sir.

Q. Their principal functions were as employees?

A. That is correct.

Q. And they occupied positions on the Board of Directors? A. Yes, sir.

Q. As you recall it, at the conclusion of the various negotiations you told Mr. McArthur that it was desired that [18] the property be taken in the name of the corporation? A. Yes.

Q. That title be held? A. Yes, sir.

Q. To the best of your recollection that is the first time that the question of the corporate identity or entity had come up? A. That is correct.

Q. In connection with your operation of the corporation it is a fact that you expended corporate moneys with reference to your own home; is that right, and subsequently transferred the home to the corporation? A. Yes, sir.

(Testimony of Kenneth P. Schmidt.)

Q. As a matter of fact, all of your personal and private business was carried on either through the corporation or individually as it might be convenient at the time; isn't that correct?

A. I don't understand that question.

Q. I think perhaps it is a little hard to understand. Did you conduct any other business personally other than what was conducted through the corporation?

Mr. Cahill: Will you fix a time, counsel?

Q. (By Mr. Blanche): During the period of the fall of 1952 and the spring of 1953, did you conduct any business individually?

A. No. The business was all in the corporation. That [19] was the only building project I had going and the only corporation.

Q. When you received a deed to this piece of property did you receive a deed from the Polikowskis on behalf of the corporation? A. Yes, sir.

Q. That was not set up on the books and records of the corporation for some reason or other. Do you know why, Mr. Schmidt?

A. I only had one girl in the office, Mrs. Clark. My records were never up to date. They were kept loosely. We had auditors, but we were short of funds. The records are in very poor shape.

Q. In your petition under Chapter XI you did not include this property as an asset of the corporation. Was that merely an oversight, is that correct?

A. I assume that is correct, yes.

Q. You had no independent recollection of that

(Testimony of Kenneth P. Schmidt.)

when you signed the schedules? A. No.

Q. Do you recall whether or not you gave your personal check to the escrow, or was it a corporate check, when you paid the escrow expenses at the Mutual Building & Loan?

A. I cannot recall. I assume it would be a corporation check.

Q. Did you do business either way? Was it your habit [20] to give a corporation check or a personal check?

A. It was a corporation check, I am pretty sure of that.

Q. Where do you reside at the present time, Mr. Schmidt? A. Newport Beach.

Q. Do you have an address there?

A. 1101 State Highway, Post Office Box 13, Balboa Island.

Mr. Blanche: That is all.

Mr. Cahill: I don't want to interfere with the order of evidence offered by counsel. I know he will want to continue with this, but I would like to ask one question so that we don't lose continuity of this thing.

The Referee: Proceed.

Cross-Examination

By Mr. Cahill:

Q. Mr. Schmidt, there has been reference to Stan Schmidt being an officer and director. Who was he?

(Testimony of Kenneth P. Schmidt.)

A. He started out as superintendent of the tract, and he was superintendent of the tract for about 30 days.

Q. Was he an officer and director?

A. Yes, he was.

Q. For how long?

A. For a very short period, I don't recall exactly.

Q. Was he an officer and director into 1952? [21]

A. You would have to refer to the records, Mr. Cahill. I don't remember.

Mr. Cahill: I have no further questions at this time.

The Referee: Mr. McDonnell, do you have any questions?

Mr. McDonnell: We will excuse Mr. Schmidt, subject to being recalled when we put on our case.

The Referee: Do you have any questions to ask at this time?

Mr. McDonnell: Not now, your Honor.

Mr. Blanche: In addition, your Honor, I would like to introduce the escrow, and I will tell counsel that the escrow instructions are signed Kenneth P. Schmidt, individually, and Kenneth P. Schmidt Builders, Inc. That is the only thing I wanted to establish by the escrow instructions, as to who the actual purchaser of this property was. Our contention in this regard is that it was Mr. Schmidt individually—not necessarily relying on the alter ego—but Mr. Schmidt was the purchaser and the Kenneth P. Schmidt Builders were purchasers, and the pur-

chasers intended to take it in one of their names, to wit, Kenneth P. Schmidt Builders, Inc. I have the actual escrow instructions, your Honor.

The Referee: Very well. Any more evidence this morning?

Mr. Blanche: No, your Honor. I merely wanted to introduce the instructions and amendments to the instructions [22] to show the signatures of the purchasers on it.

The Referee: Unless the other parties will stipulate——

Mr. Blanche: I would like to do that. I feel we could save time if I tell counsel what I have in mind.

Mr. Cahill: We can't do that. Here is the escrow and it is addressed to Kenneth P. Schmidt Builders, Inc., and its officers. We can't stipulate to that.

Mr. Blanche: No, I don't want you to stipulate to that, but I would like to introduce this without further testimony by Mr. Schmidt.

The Referee: Mr. Cahill, what is your theory of the defense to this?

Mr. Cahill: Notwithstanding these leading questions that were asked by counsel, your Honor, neither Mr. Schmidt nor his wife were in the building business at all. Mr. Schmidt was engaged in a very large building operation at the time in question, known as the Kenbo Corporation, an entirely different corporation in which he was half owner; that Kenneth P. Schmidt Builders, Inc., the debtor, was engaged in certain building activities previously——

The Referee: Do you mean the corporation?

Mr. Cahill: Yes, your Honor—and had purchased in its own behalf these lots, and pretty much as is shown in Paragraph 5 of the letter of October 5. I think the whole thing is in there. It was agreed regardless of who the purchasers were that a mortgage was to be put on, money was to [23] be borrowed on the lots and houses to be built, and out of that the seller was to be paid. If that is factually correct then the law takes over. That type of agreement is totally inconsistent with a vendor's lien. No lien can be retained under the circumstances. If there was a lien obviously the lenders would not make a first mortgage loan for the purpose. I have ample law on the subject, including a decision of the United States Supreme Court.

The Referee: You say there was a mortgage to be put on it. For whose benefit?

Mr. Cahill: For the purpose of obtaining funds to build houses—out of the mortgage loan or out of the sale of houses, to pay the seller \$20,000 for the loan.

The Referee: This mortgage wasn't for the benefit of the seller. It wasn't to secure the payment of the note.

Mr. Cahill: No. It was for the purpose of getting money to build houses. The law takes over right then and there if those are the facts.

The Referee: Isn't this more or less a legal matter? Is it denied that there was an understanding that they were to get a mortgage?

(Testimony of Kenneth P. Schmidt.)

Mr. Blanche: That original letter was changed, if the Court please, and the escrow instructions—these are part of the original negotiations and it contemplated a second mortgage be taken by the Polikowskis, but it never carried through. The escrow instructions provided thereafter for the [24] purchasers to give a note.

The Referee: We will have to take evidence on that.

Mr. Cahill: I think so, your Honor.

The Referee: I guess so.

Mr. Blanche: The escrow instructions will speak for themselves, if the Court please.

The Referee: We will have to see what they show. Now we have the question of when we should continue this. How are you fixed, Mr. Cahill?

Mr. Cahill: Any time after Monday, your Honor, unless the Newport case should go into an extended hearing.

(Discussion held off the record in re continuance.)

The Referee: I will continue this matter until the 25th at 11 o'clock.

(Whereupon the matter was continued to November 25, 1953, at 10 o'clock a.m.) [25]

CERTIFICATE

I, Byron Oyler, hereby certify that on the 19th day of November, 1953, I attended and reported, as official court reporter, the proceedings in the

above-entitled and numbered matter before the Honorable Reuben G. Hunt, Referee in Bankruptcy, in said Matter, and that the foregoing is a true and correct transcript of the proceedings had therein on said date, and that said transcript is a true and correct transcription of my stenographic notes thereof.

Dated at Los Angeles, California, this the 10th day of February, 1954.

/s/ BYRON OYLER,
Official Court Reporter.

[Endorsed]: Filed February 12, 1954. [26] Referee.

November 25, 1953, 11:00 A.M.

The Referee: Are you ready to proceed?

Mr. Blanche: Yes, your Honor.

The Referee: Call your first witness.

Mr. Blanche: I will call Mr. Lynn to the stand.

PHILIP E. LYNN

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Blanche:

Q. Will you state your full name?

A. Philip E. Lynn.

October 30

MEMO.

Paid outside of Escrow
Cash through Escrow
Encumbrances of Record

New Encumbrances	10,000.00
Total consideration	20,000.00

Title Insurance and Trust Company

A portion of Lot 1 of Tract 1032

Free of encumbrances except: 1 All General and special Taxes for the fiscal year 19 52, 19 53, including
PERSONAL PROPERTY TAXES of any former owner, AND ALSO INCLUDING ANY SPECIAL DISTRICT LEVIES, PAYMENT OF WHICH
IS INCLUDED THEREIN AND COLLECTED THEREWITH; all taxes and assessments levied or assessed subsequent to date of these transac-
tions; conditions, restrictions, reservations, covenants, rights, rights of way, easements and the exception of water on or under said land, now of
record, if any;

Mortgage or Trust Deed securing an indebtedness in favor of NONE
 as per its terms, now of record, Beneficiary's statement to show an unpaid balance of principal of \$ NONE but if same should now
 be more or less than said amount, then you are to keep the total consideration the same as shown above, by adjusting the cash through . . .

TRUST DEED on your usual form } in favor of CLARENCE E. POLIKOWSKY and WINIFRED POLIKOWSKY _____
 securing note of \$ 20,000.00 , dated October 30, 1952 , all due & paid
30, 1953, or six months from close of escrow, whichever date is sooner.

payable at _____, with interest from _____ at the rate of X _____, times
per annum, payable _____, principal and interest payable \$X _____ or more on the X day of each
X month, beginning on the _____ day of X _____, 19____. X

Interest @ 6% per annum payable from November 30, 1953, or the close of escrow, whichever date is sooner.

Note shall be signed by the vestee corporation, and by Kenneth P. Schmidt, personally.

Buyer agrees to pay all buyers costs, and all sellers costs to the extent of \$150.00. Any sellers costs in excess of \$150.00 are to be charged to the seller.

It is understood that the above trust deed will be subordinated to the lien of all construction loans made by any savings and loan association, made by the buyer for the construction of improvements on property. Subordination agreement to be incorporated in deed of trust when recorded.

The completion of this escrow is contingent upon the following:

1. The approval of the legal description of subject property and the preliminary title report by buyer.
2. The approval by the buyer and seller of a release clause to be incorporated in the above trust deed.
3. The acceptance by the seller of the bond or bonds put up by the City of Los Angeles for the completion of the street and utility improvements on property ~~where the improvements~~

At the close of each day you are instructed to forward to the 1st Arthur Company, Co., buyers and sellers trading statements.

THE FOLLOWING ADJUSTMENTS OR THEY ARE REQUIRED IN THIS ESCROW:

Interest on Mortgage and/or Trust Deeds of record and any funds shown impounded for future interest on the same.
 Insurance Premium paid P.H.A. During past 12 months based on lender's statement to
 Interest on new encumbrances by endorsements on notes to
 Taxes, including all items appearing on tax bill except taxes on personal property not conveyed through this escrow.
 based on latest tax statement in your possession. Rentals on basis of statement furnished by seller and approved by me to
 but make no adjustment on uncollected rentals.

Accept for me such insurance policies as are submitted on buildings situated either on property above described or on premises known as
 and prorate premiums thereon from

You may assume that premiums on said policies have been paid and that the policies have not been hypothecated.

Make all adjustments on the basis of a 30 day month. "Close of Escrow" is the day instruments are recorded or registered.
 I agree to pay on demand all prorata adjustments chargeable to me; charges for recording deed, for notary fees on documents executed
 me; for mortgage clause on insurance; for drawing mortgage and/or trust deed; cost of drawing and recording any other documents necessary
 my part to complete this escrow; Title Company's charge, if any, for showing title vested in me, and Buyer's escrow fee as charged.

Seller agrees to pay outside of escrow, and before delinquency, all taxes on personal and/or real property not conveyed through this escrow
 which appear a lien on above described property, and you are not to be concerned therewith.

The seller guarantees that the premium on any loan and policy which he hands you or causes to be handed you in this escrow has been paid in full
 and that said policy has not been hypothecated.

Deliver assurance of title and insurance policies, if any, to holder of first encumbrance, or order if any. Make disbursements by your check
 Duplicates and checks in my favor to be mailed to my address shown below, unless you are otherwise instructed.

If the conditions of this escrow have not been complied with at the time herein provided, you are nevertheless to complete the same as soon as
 the conditions (except as to time) have been complied with, unless I shall have made written demand upon you for the return of money and/or interest
 money deposited by me.

NO NOTICE, DEMAND OR CHANGE OF INSTRUCTIONS SHALL BE OF ANY EFFECT IN THIS ESCROW UNLESS GIVEN IN
 WRITING BY ALL PARTIES AFFECTED THEREBY. In the event conflicting demands are made or notices served upon you with respect to
 this escrow, the parties hereto expressly agree that you shall have the absolute right at your election to do either or both of the following: withhold
 and stop all further proceedings in, and performance of, this escrow, or file a suit in interpleader and obtain, as order from the court requiring the
 parties to interplead and litigate in such court their several claims and rights amongst themselves. In the event such interpleader suit is brought, you
 shall (upon being fully released and discharged from all obligations to further perform any and all duties or obligations imposed upon you in this
 escrow, and the parties jointly and severally agree to pay you all costs, expenses, and reasonable attorney's fees expended or incurred by you, the
 amount to be fixed and a judgment thereon to be rendered by the court in such suit.

You are not to be held liable for the sufficiency or correctness as to form, manner of execution, or validity of any instrument deposited in this
 escrow, nor as to identity, authority, or rights of any person executing the same, nor for failure to comply with any of the provisions of any agree-
 ment, contract, or other instrument filed herein or referred to herein, and your duties hereunder shall be limited to the safekeeping of such money
 and papers, to other documents received by you as escrow holder, and for the disposition of same in accordance with the written instructions accept-
 ed by you in this escrow.

All parties hereto further agree, jointly and severally, to pay on demand, as well as to indemnify and hold you harmless from and against all
 costs, damages, judgments, attorney's fees, expenses, obligations and liabilities of any kind or nature which, in good faith, you may incur or sustain
 in connection with or arising out of this escrow, and you are hereby given a lien upon all the rights, title and interest of each of the undersigned in all
 escrowed papers and other property and monies deposited in this escrow, to protect your rights and to indemnify and reimburse you under this
 agreement.

It is agreed by the parties hereto that so far as your rights and liabilities are involved, this transaction is an escrow and not any other legal
 relation and you are as escrow holder only on the foregoing expressed terms, and you shall have no responsibility of notifying me or any one of the
 parties to this escrow of any rule, result, loan, encumbrance, or other transaction involving any property hereto described or of any profit realized by any
 person, firm or corporation (broker, agent and parties to this and/or any other escrow included) in connection therewith, regardless of the fact that such
 transactions may be handled by you in this escrow or in another escrow.

These instructions may be executed in counterparts, each of which when executed shall, irrespective of the date of its execution and delivery, be
 deemed an original, and said counterparts together shall constitute one and the same instrument.

Any amended, supplemental, or additional instructions given shall be subject to the foregoing conditions.

THE FOREGOING TERMS, CONDITIONS, PROVISIONS AND INSTRUCTIONS HAVE BEEN READ AND ARE UNDERSTOOD
 AND AGREED TO BY EACH OF THE UNDERSIGNED.

KENNETH P. SCHMIDT BUILDERS, INC.
 Signature: *Kenneth P. Schmidt* Address: **KENNETH P. SCHMIDT**
513 S. Atlantic Blvd. Phone: **AT 44110**
Monterey Park, California
 Signature: _____ Address: _____ Phone: _____
SELLER

October 30 19 52

THE FOREGOING TERMS, CONDITIONS AND/OR INSTRUCTIONS ARE HEREBY CONCORRED IN, APPROVED AND ACCEPTED

I will hand you all instruments and money necessary of me to enable you to comply therewith, including a deed of the property described,
 executed by **CLARENCE E. POLIKOWSKY and WINIFRED POLIKOWSKY, his wife,**

which you are authorized to use and/or deliver when you hold in this escrow for the account of
 the **grantees**

the sum of \$ **2000** and any prorata adjustments and instruments deliverable to me under these instructions. Pay at the close of
 escrow any encumbrances necessary to place title in the condition called for under these instructions. Portion of prorata adjustments and the fol-
 lowing:

My commission of \$ **600.00** to **W. W. Duncan**
 (Broker's License No. _____), whose address is: **24 N. Marengo Avenue, Pasadena, California, and**
commission of \$400.00 to the Mac Arthur Company, 24 N. Marengo Avenue, Pasadena, California,
shall be in the form of unsecured promissory notes in favor of said brokers executed
by the sellers. Said notes will be deposited in escrow for delivery to the payees named
therein at the close of escrow. Note shall provide for interest at _____ per annum. Notes for
commissions payable at the same time and on the same terms as the promissory note.

You will, as my agent, assign any insurance of mine handed you for use in this escrow. I agree to pay in advance charges and expenses
 of title, for sending in offset mortgages and/or beneficiaries' statements, for demands for
 acknowledging documents executed by me; my commission and recording charges including recording
 insurance if procured;

\$ **22.00** U.S.P. stamps being the proper amount to be affixed to my deed, and sell
 have your check for balance of _____ of _____
 or credit balance to

Signature: *Clarence E. Polikowsky* Address: _____

(Testimony of Philip E. Lynn.)

Q. (By Mr. Blanche): There are amended instructions dated December 5, is that right?

A. Yes.

Q. Did you also make a photostatic copy of those? A. Yes.

Mr. Blanche: I will offer the amended instructions dated December 5 as Petitioner's Exhibit 4.

(The documents were marked as one exhibit, Petitioner's Exhibit 4.)

PETITIONER'S EXHIBIT No. 4

(Filed Nov. 25, 1953)

Amended Instructions

December 5, 1952.

Mutual Savings and Loan Association,
315 East Colorado Street,
Pasadena 1, California.

Gentlemen:

Re: Escrow No. 0-4830

My instructions in this escrow are amended and/or supplemented in the following particulars only:

All references to the trust deed and note for \$20,000.00 are deleted.

The reference to the subordination of the trust deed to the construction loans is deleted.

The items 1, 2, and 3 upon which the completion of the escrow is contingent upon are deleted.

In lieu thereof the Kenneth P. Schmidt Builders, Inc., a California corporation, will hand you an

(Testimony of Philip E. Lynn.)

unsecured promissory note for \$20,000.00 in favor of Clarence E. Polikowsky and Winnifred Polikowsky, his wife, as joint tenants, dated December 5, 1952, payable on or before 190 days from date, with interest at 6% per annum payable at maturity. Said note shall also be executed by Kenneth P. Schmidt and Mary W. Schmidt individually. Endorse interest on said note to the close of escrow.

Deliver the note to the payees named therein, at the close of escrow.

KENNETH P. SCHMIDT
BUILDERS, INC.

By /s/ CLARENCE E. POLIKOWSKY.

By /s/ WINNIFRED POLIKOWSKY.

KENNETH P. SCHMIDT,

/s/ KENNETH P. SCHMIDT.

MARY W. SCHMIDT,

/s/ MARY W. SCHMIDT.

Mr. Blanche: This is a photostatic copy, Mr. Cahill, the original being here and it is being stipulated that it may be introduced in lieu of the original.

Mr. Cahill: So stipulated.

The Referee: Anything further?

Mr. Blanche: You may inquire. [4]

Mr. McDonnell: I have a few questions.

Cross-Examination

By Mr. McDonnell:

Q. First of all, let me ask if there were any other changes in the escrow instructions other than

(Testimony of Philip E. Lynn.)

the one you have shown us and which we have offered in evidence?

A. There were some other amended instructions.

Q. Do you have them in the file with you?

A. But it did not basically change it, I guess.

Q. May I see them?

A. Yes. Here they are (indicating).

Q. These instructions cover a development about the recordation of the deed?

A. That is correct.

Q. They do not affect the consideration in any way? A. No.

Q. Mr. Lynn, did you personally handle this transaction? A. Yes, I did.

Q. From its outset, from the original instructions and everything forward?

A. That is right.

Q. Who first came into your office in connection with these instructions?

A. The agent, the McArthur Company. [5]

Q. Did Mr. Schmidt come in at that time?

A. No. Mr. Schmidt came in later.

Q. At that time when he came in later on was that when he signed the escrow instructions?

A. Yes.

Q. When he came in who was present besides Mr. Schmidt and yourself, anybody else?

A. Not that I recall.

Q. I note that the first amendment to the escrow instructions delete the requirement of a trust deed. When was that change first brought to your atten-

(Testimony of Philip E. Lynn.)

tion? Was that the time you got the amendment?

A. The day the amendment was made, yes.

Q. Did some one come in to see you about it?

A. All of the parties to the escrow were in the office at that time.

Q. The Polikowskis? A. I believe so.

Q. And Mr. Schmidt? A. I believe so.

Q. Was there a discussion about the change to be made in the escrow instructions at that time?

The Referee: Are you trying to go behind the terms of this written contract?

Mr. McDonnell: No, your Honor.

The Referee: Unless there is some ambiguity, you are [6] not entitled to go into oral conversations that took place regarding this written document.

Mr. McDonnell: I am not permitted to put in evidence which would vary the terms of a written document.

The Referee: All right.

Mr. McDonnell: I am not trying to do that.

The Referee: What are you attempting to do?

Mr. McDonnell: I want to establish what the conversation was as to the reason for the change being made. It may be a pertinent factor in this litigation.

Mr. Blanche: I will object to that.

The Referee: Objection sustained.

Mr. McDonnell: Then may I make this offer of proof, your Honor? Frankly I haven't had an opportunity to interrogate and examine this witness, but it is our contention that there was a definite

(Testimony of Philip E. Lynn.)

purpose in removing the requirement of the trust deed, and I will offer to prove by this witness and by Mr. Schmidt that the purpose of making the change was to permit the placing of other encumbrances on this property, and as Mr. Cahill indicated that will form the basis of the legal argument in this case.

Mr. Blanche: I think it is entirely irrelevant. There is no contention that any encumbrances were placed on there. I think that would be a good defense as to any subsequent encumbrances put on there or purchases for value without [7] notice. I think the escrow instructions speak for themselves.

Mr. McDonnell: We are prepared to cite cases.

The Referee: I would like to hear them.

Mr. McDonnell: We are prepared to cite cases which we believe establish the law on this point.

The Referee: I know those cases. I have examined them myself, but the question is whether you can show some oral understanding in addition to this agreement. Here is a definite agreement between the parties.

Mr. McDonnell: That is correct, and we are not attempting to vary or change it one jot or tittle.

The Referee: You are attempting to introduce some oral transaction in addition to what you claim is a complete contract.

Mr. McDonnell: No, we are not, if your Honor please. This does not affect the contract at all. The parties may have a number of reasons for acting in a certain fashion.

(Testimony of Philip E. Lynn.)

The Referee: It is not a reason. It is a question of whether they agreed to do certain things. They claim they agreed to do certain things. The things you claim are not contained in these escrow instructions signed by all parties.

Under the circumstances and under the parol evidence rule of California oral testimony cannot be received to show a different intent or a different reason [8] or a different idea of the parties to this contract than what is expressed on the face of the instrument. You may proceed.

Mr. Blanche: That is all, your Honor.

Mr. Cahill: I have no questions.

The Referee: You are excused, Mr. Lynn. Call your next witness.

Mr. Blanche: I think the only other thing was the thought of having the minute books in order to determine who the officers and directors were.

The Referee: Is that important here?

Mr. Blanche: I don't think it is very important. I think the testimony is clear enough in the first place. The Court, however, did suggest that we have the minute books because that would be the best evidence, but I don't believe they are really necessary at this time.

The Referee: I don't think the matters relating to corporate officers, stockholders and directors are important. It is already established who they were. Mr. Cahill can give us that information. Do you rest?

Mr. Blanche: I rest.

The Referee: What about you gentlemen?

Mr. McDonnell: I would like to call Mr. Schmidt.

The Referee: Upon what theory? If you can show me some authority whereby I can let it in, I will hear you.

(Citation of cases and argument omitted at this point.) [9]

Mr. McDonnell: I would like to put Mr. Schmidt on the stand and make an offer of proof so that I have a complete record.

The Referee: You don't have to do it that way, Mr. McDonnell. Make your offer of proof.

Mr. McDonnell: I just wanted to call him to the stand.

Mr. Cahill: Ask him a few questions because they may be acceptable all the way around.

The Referee: Make your offer of proof and I will rule on it.

Mr. McDonnell: I will ask that Mr. Schmidt be sworn.

(Kenneth P. Schmidt sworn.)

Mr. McDonnell: I would like to make the following offer of proof: I propose to show by the testimony from Mr. Schmidt that the agreement between Mr. Schmidt and the Polikowskis—not the agreement, but the intent of the making of the agreement whereby title was transferred in exchange for a promissory note, was to permit Kenneth P. Schmidt Builders, Inc., who we allege to be the purchaser, to encumber the property with a trust deed or other

encumbrance so as to enable them to pay off the vendors of the property, the Polikowskis. That is the offer of proof.

The Referee: Do you offer to prove that by any written instrument? [10]

Mr. McDonnell: There is no written record outside of the letter which indicates that which I think is marked Petitioner's Exhibit No. 1 in evidence. I think that indicates there was some intent between the parties.

The Referee: Let's be clear about that. I don't remember anything about that.

Mr. McDonnell: There is a lengthy letter in the file, if the Court please.

The Referee: Let me get it.

Mr. Cahill: It is Paragraph 5.

Mr. Blanche: I have another copy of the letter.

The Referee: This letter antecedes these two exhibits, 3 and 4.

Mr. Blanche: That is correct.

The Referee: Why isn't that letter merged in these contracts?

Mr. Blanche: It is.

The Referee: Let me see the letter.

Mr. Blanche: I am sorry. I introduced it.

Mr. Cahill: It is Paragraph 5, your Honor.

The Referee: Do you have a copy of it?

Mr. Cahill: No.

The Referee: I have sent for it.

Mr. Blanche: With reference to the offer of proof, your Honor, I will object to it. The question of this letter, there is no question but what the

letter provided [11] originally that the purchasers would take back a second trust deed and permit Mr. Schmidt to place liens on it. That was later changed. The original escrow instructions provided for that. That was later changed. We introduced the letter to show who Mr. Polikowski thought he was doing business with.

Mr. McDonnell: The purpose of making the offer of proof is to show why the change was made.

The Referee: Your offer is solely based on something that happened before the contract was signed by the parties, to show that they had something different in mind than what is shown in the contract.

Mr. Blanche: That is right.

Mr. McDonnell: No.

The Referee: Under the California Parol Evidence Rule you have to show first it was either ambiguous or uncertain or was obtained under fraud or duress before you can open up and go back to conversations between the parties and try to show something different than is expressed in writing.

Mr. McDonnell: So that the record will be clear, my purpose in making the offer of proof is not to show any difference in the terms of the contract between that which constitutes the amended instructions.

The Referee: You are trying to add something to it that isn't there. [12]

Mr. McDonnell: I am not attempting to add something. I am attempting to show something completely outside of the matter.

The Referee: You are trying to add something to the contract.

Mr. McDonnell: No, I am not.

The Referee: You are trying to show that they had some kind of an agreement that Mr. Schmidt could put liens on the property without the objection of the vendor. That is what you are trying to do.

Mr. McDonnell: I will offer authorities on the point as to whether or not I can offer evidence. Does your Honor wish me to do that, or do you want to handle it in an oral fashion?

The Referee: I asked for authorities in the beginning. You didn't want to do it. You went ahead and made your offer of proof. Of course, I am glad to have authorities on all matters involved here. No judge knows all of the law. I think I made my position clear. If you can show me anything which will give you a right to show that there was some arrangement in addition to this or contrary to it by oral conversation between the parties prior to making this instrument, I would like to see them.

Mr. McDonnell: I will see if I can do so, your Honor. I have made my record.

The Referee: Do you want to submit this on briefs? [13]

Mr. Cahill: From my viewpoint, your Honor, I hardly think it is necessary. The reason I don't think it is necessary is because in the writings themselves under the cases, the cases resolve right in the writings.

The Referee: There is one case here that supports the position. Apparently it supports the posi-

tion that the signatures of Mr. and Mrs. Schmidt constituted a security, therefore the vendor's lien was waived. The other cases don't go to that effect.

Mr. Cahill: If I may interrupt your Honor, yesterday we tried to find a case. It is 10 Cal. App. 2d 555. Is your Honor familiar with that case?

The Referee: Yes.

Mr. Cahill: If your Honor will let me have the original escrow instructions I will call your attention to the important wording.

The Referee: The original instructions were amended.

Mr. Cahill: In one particular.

The Referee: They were amended so that the trust deed was not to be given.

Mr. Cahill: That is all right. The wording I direct your Honor's attention to, in light of the decisions, is this: "Free of all encumbrances"—I had better read back a little bit—"showing title vested in Kenneth P. Schmidt Builders, Inc., a corporation, free of all encumbrances except all general and special taxes," and so forth. That [14] case holds that where you use those words it precludes any hope of a retained vendor's lien.

The Referee: That is right. What about that?

Mr. Blanche: I have a case in point on that from the Supreme Court of the United States.

The Referee: But the California law applies here, not the Supreme Court of the United States.

Mr. Blanche: It is the same thing here, if the Court please.

The Referee: Mr. Cahill pointed out something

I had not noticed before. These original escrow instructions provide that title be vested in the Debtor corporation free of encumbrances except for certain taxes and so forth.

The decision of the Supreme Court in a case like that must have come from some other state, not California.

Mr. Blanche: This particular case, I believe, came from Colorado.

The Referee: We have to go by the California law here.

Mr. Blanche: I read that case, your Honor. I checked that point. I would like permission to cite authorities in that regard.

The Referee: I think authorities ought to be filed.

Mr. Blanche: Also I would like to cite to the Court one case——

The Referee: You may cite that in your authorities. That is the best way to handle it. [15]

Mr. Blanche: It is the only case in the United States that I have been able to find.

The Referee: Cite it in your authorities. How long do you want, ten, ten and five?

Mr. Blanche: That will be all right. May I lead off?

The Referee: You are the Petitioner. I think perhaps you should.

Mr. Cahill: Ten, ten and five, is quite satisfactory.

Mr. McDonnell: Shall I bring up my points in my brief?

The Referee: Yes. If I am wrong I would like to know it. [16]

I, Byron Oyler, Official Court Reporter, do hereby certify that the foregoing sixteen (16) pages comprise a true and correct transcript of the proceedings had in the above-entitled matter.

Dated this 11th day of January, 1954.

/s/ BYRON OYLER,
Official Reporter.

[Endorsed]: Filed January 13, 1954. Referee.

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy, No. 57,338-HW

In the Matter of:

KENNETH P. SCHMIDT BUILDERS, INC.,
Bankrupt.

REPORTER'S TRANSCRIPT OF REHEARING
ON PETITION TO HAVE VENDOR'S
LIEN DECLARED ON CERTAIN REAL
PROPERTY IN PASADENA

Appearances:

For the Petitioners:

JOHN K. BLANCHE, ESQ.

For the Trustee:

C. E. H. McDONNELL, ESQ.

For the Bankrupt:

L. M. CAHILL, ESQ.

Thursday, March 4, 1954, 10 A.M.

The Referee: Kenneth P. Schmidt Builders, Inc.

Mr. McDonnell: That is ready, your Honor.

The Referee: Go ahead.

Mr. McDonnell: This is a reopened hearing that the Court has reopened on its own motion for the purpose of taking certain testimony from Mr. Schmidt——

The Referee: It is for the purpose of taking any testimony either side will want that is relevant and competent.

Mr. McDonnell: Very well, your Honor. I would like to call Mr. Schmidt.

KENNETH P. SCHMIDT

called as a witness on behalf of the Trustee, being first duly sworn, testified as follows:

Direct Examination

By Mr. McDonnell:

Q. Your name is Kenneth P. Schmidt?

A. Yes, sir.

Q. And you are at present president of the bankrupt corporation, Kenneth P. Schmidt Builders, Inc.?

A. Yes, sir.

Q. Were you president during the year 1952?

A. Yes, sir.

Q. You testified here before, Mr. Schmidt, concerning [2*] a certain transaction in which a parcel of real property was purchased from Winnifred

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Kenneth P. Schmidt.)

and I think it is Alfred—no, Clarence E. Polikowsky. May I have the exhibits, your Honor?

The Referee: Yes, here they are.

Q. (By Mr. McDonnell): Now, I am first going to show you, Mr. Schmidt, that which is Petitioners' Exhibit 3 in evidence, a set of escrow instructions dated October 30, 1952. I believe you previously testified you have seen those; is that correct?

A. Yes.

Q. Now, I call to your attention the fact that on those escrow instructions there is a provision which states that the buyers are going to give in favor of Clarence E. and Winnifred Poliskowsky a trust deed; and quoting from the escrow instructions: "On your usual form, securing note of \$20,000, dated October 30, 1952, all due April 30, 1953, or six months from close of escrow, whichever date is sooner."

You see that provision, do you?

A. Yes, sir.

Q. Now, I call your attention to Petitioners' Exhibit 4, which is a letter or letter form headed "Amended Instructions," and I call to your attention that that provides in part, "All references to the trust deed and note for \$20,000 are deleted."

With that before you, Mr. Schmidt, I want to ask you [3] this question: What was the—let me rephrase it this way: Can you tell us—answer yes or no—why the provision for the trust deed was deleted from the second escrow, that is from the escrow instructions, can you tell us?

(Testimony of Kenneth P. Schmidt.)

Mr. Blanche: To which I object. It calls purely for a conclusion.

The Referee: No, he is calling for a fact. I want this hearing confined within the limits of the cases I mentioned in my order for reopening.

Mr. Blanche: If there was an agreement, some conversation, that is one thing, but——

The Referee: I think the best way to do is let him answer and then you can move to strike it if it is not within the limits of the cases I cited. We don't know what the testimony will be.

Mr. McDonnell: I merely asked him for a yes or no answer.

The Witness: Would you restate it, please?

(Record read as follows: "Q. Can you tell us—answer yes or no—why the provision for the trust deed was deleted from the second escrow, that is from the escrow instructions, can you tell us?")

The Witness: Yes.

Q. (By Mr. McDonnell): Now, was there some conversation concerning that change? Answer yes or no. [4]

The Referee: With whom?

Mr. McDonnell: Well, I will build the foundation.

The Witness: Yes.

Q. (By Mr. McDonnell): And with whom was the conversation and where did it take place?

A. It took place with the broker over the telephone, and then with the escrow agent, Mr. Lynn,

(Testimony of Kenneth P. Schmidt.)

at the Mutual Loan & Savings Escrow Department.

Q. To whom do you have reference when you say with the broker? Do you know the broker's name?

A. Mr. MacArthur, Jr., and Paul Duncan, who was a salesman in Mr. MacArthur's office.

Q. Do you recall with whom you actually had that conversation?

A. It was discussed with both parties.

Q. Was it discussed on more than one occasion?

A. I don't recall. I know we discussed it over the telephone with Mr. Duncan and then Mr. MacArthur, explaining why we wanted to amend the escrow instructions.

Q. And how long before the escrow instructions were amended did this conversation take place?

The Referee: The original or amended?

Mr. McDonnell: The amended, about how long before that?

The Witness: Oh, I would say a couple of weeks, to the best of my memory. [5]

Q. (By Mr. McDonnell): Now, can you give us the sum and substance of that conversation that you had?

Mr. Blanche: To which I am going to object on three grounds. First, it would have to be shown that the agent had the authority or that this was communicated to the principal. Apparently there was no conversation had with Mr. or Mrs. Polikowsky. The conversation with the broker might be an entirely different thing.

(Testimony of Kenneth P. Schmidt.)

In the second place, while I will grant the authorities cited by the Court in connection with this particular transaction, that if there are other and further things which go beyond the actual written contract, that those can be brought in by parol evidence, nevertheless I have a case here in California which is very clear on this identical point, that a man does and cannot waive his vendor's lien until he gets it.

Now, in the particular case that I have, the——

The Referee: Have you got the citation?

Mr. Blanche: I have the case right here, your Honor.

The Referee: Is it a Federal case?

Mr. Blanche: No, it is a California case, a Pacific case.

The Referee: Oh, you have the Pacific Reporter there?

Mr. Blanche: Yes.

(Argument and discussion between the Court and counsel.)

The Referee: Now, what I want to know and I think I am [6] entitled to know under these cases is why they didn't stick to the original escrow instructions and why they had amended escrow instructions of an entirely different nature. That will help me interpret the intent of the parties to the agreement. I think that is perfectly consistent with these California cases that I have cited to you.

Now then, if any of this testimony tends to vary or contradict any of the terms of the amended in-

(Testimony of Kenneth P. Schmidt.)

structions or the original instructions that were not amended, I think that is out of order and you are entitled to object. But if they are entirely consistent, as stated here in these cases, with the original or amended instructions, then I think it is proper.

Mr. Blanche: Well, may I point out that in this case the offer of proof—

The Referee: You mean what was done before?

Mr. Blanche: Well, I gather that this is in connection with the offer of proof made by Mr. McDonnell.

The Referee: No, that is out. I ruled wrong on that and I am reopening the case and counsel can produce any evidence in line with these cases to show what the intent of the parties was in making those changes. I think I have to receive it.

Mr. Blanche: Basically Mr. McDonnell said: "I propose to show by the testimony from Mr. Schmidt that the agreement between Mr. Schmidt and the Polikowskys—not the [7] agreement, but the intent of the making of the agreement whereby title was transferred in exchange for a promissory note, was to permit Kenneth P. Schmidt Builders, Inc., who we allege to be the purchaser, to encumber the property with a trust deed or other encumbrance so as to enable them to pay off the vendors of the property, the Polikowskys."

Now, that is in my opinion an amplification of the agreement. Now, if it merely goes to the intent in making the agreement, I don't see how the intent can be charged to the Polikowskys unless they know about it.

(Testimony of Kenneth P. Schmidt.)

The Referee: I know, but the knowledge of the agent is knowledge of the principal. If you permit an agent to go out and negotiate a sale of your property and then he comes to you with an agreement, you are bound by what he does.

Mr. Blanche: An authority to negotiate a sale of real property must have been in writing.

The Referee: Are you repudiating these brokers?

Mr. Blanche: Not their right to negotiate a sale at all.

The Referee: Then if they had a right to negotiate a sale then we have a right to know what the negotiations were that led up to the agreement. There must have been some reason to change from the original to the amended escrow instructions. I think the Court is entitled to know what that reason [8] was.

Mr. Blanche: May it go in subject to my objection?

The Referee: Certainly. You can do it that way, or when it is all in you can move to strike it.

Mr. Blanche: Very well.

Mr. McDonnell: Before we go forward, apparently the agency of the MacArthur Company is going to be a factor in this case, and we have not gone into that. Does the Court wish me to go into the negotiations with Mr. Schmidt—

The Referee: Mr. McDonnell, you are trying the case. It is up to you.

Mr. McDonnell: All right.

(Testimony of Kenneth P. Schmidt.)

Q. I will put the question to you again. Mr. Schmidt, you have told us about some conversations you had with I think Mr. MacArthur, Jr., and someone else. Can you tell us what the substance of those conversations was?

A. I asked them if they would contact the owner of the property for the purpose of amending the original escrow instructions. I would like to have title delivered to Kenneth P. Schmidt Builders, Inc., because the corporation was at the time active in developing houses in Monterey Park. So it would be better for us to develop their property under the building company, Kenneth P. Schmidt Builders, Inc., and for the purpose of borrowing money to build the nine or ten houses on the Polikowsky property, it would be necessary for them to either take back a second trust deed and subordinate themselves to a first trust deed, which I would have [9] to put of record in favor of the corporation, but it would be more desirable if they would give the corporation clear title to the property and for security and collateral take back a promissory note executed by Mrs. Schmidt and myself.

Q. That was the conversation after the first——

A. That was my request.

Q. And what did they say?

A. Mr. MacArthur, or the MacArthur Company, said they understood the request, why I wanted it, and they would contact the owners of the property to see if it was possible. A period of time passed and——

(Testimony of Kenneth P. Schmidt.)

Q. Then did you have another conversation with him?

The Referee: Just a minute. He said time passed, then what?

The Witness: A period of time passed and the MacArthur Company notified me that the request was acceptable and they were preparing the amendments, and they were prepared and executed.

Q. (By Mr. McDonnell): Do you know who called you the second time or who you talked with the second time?

A. All my conversations were carried out with either Mr. MacArthur, Jr., or Mr. Duncan. I honestly can't tell you which it was.

Q. Now, I want to go into the question of the course of the negotiations. Did you first contact the Polikowskys or MacArthur Company or did they contact you about that [10] property?

A. I never met the Polikowskys, nor would I know them if I saw them. The property was submitted to me by Paul Duncan of the MacArthur Company.

Mr. Blanche: Just for the record, that is William Duncan?

The Witness: Excuse me, William Duncan.

Q. (By Mr. McDonnell): And was it with Mr. Duncan that you negotiated after that time?

A. Yes, he, and eventually Mr. MacArthur, Jr., was brought into the negotiations.

Q. And at the time of the first escrow instructions were you still negotiating with those two gen-

(Testimony of Kenneth P. Schmidt.)

lemen, either or both of them? A. Yes, sir.

Q. And you testified you have never had any contact with the Polikowskys? A. No, sir.

Q. Mr. Schmidt, during these conversations that you had with Mr. MacArthur and Mr. Duncan, was there any discussion as to the amount of the first trust deed loan you intended to put on the property?

A. Yes, sir.

Q. Did you name any particular figure?

A. Yes, sir.

Q. What was that? [11]

A. I told them that the Mutual Savings & Loan where we had the escrow opened had given me a verbal commitment to finance the homes, and I would borrow in the neighborhood of \$11,000 to \$12,500, construction loans, which would be around \$100,000 for the purpose of building the homes.

Mr. McDonnell: I think that is all the questions I have.

Cross-Examination

By Mr. Blanche:

Q. You never placed a trust deed on the property? A. No, sir.

Q. In favor of the Mutual Building & Loan?

A. No, sir.

Q. There is no one who loaned any money on the property on the strength or security of your title; is that correct? A. No, sir.

Q. Did you ever include this title to the Polikowsky property in any of your financial state-

(Testimony of Kenneth P. Schmidt.)

ments that you made to creditors or anybody?

The Referee: What do you mean, he personally or the corporation?

Mr. Blanche: On behalf of the corporation.

Mr. McDonnell: Just a moment. I am going to object to that. That assumes he made financial statements after the purchase of the property. There is no showing of that [12] here.

The Referee: No, I will overrule the objection.

The Witness: Not to my knowledge, sir. I would say that with reservations, but not to my knowledge. All I did was spend several thousand dollars engineering the map, and it is ready to record, the subdivision, but was never encumbered or to my knowledge used as an asset in the corporation.

Q. (By Mr. Blanche): As a matter of fact, it was not included on the books of the corporation, was it? A. Entered as an asset?

Q. Yes.

A. Well, I had nothing to do with the books. I really do not know.

Q. Now, did you tell Mr.—

The Referee: Wait a minute. It was listed in your schedules as an asset, wasn't it?

Mr. Blanche: Not at first.

The Referee: Mr. Cahill, wasn't it listed in the schedules as an asset?

Mr. Cahill: Not in the original schedules because I did not have the books.

The Referee: Did you ever file an amended schedule?

(Testimony of Kenneth P. Schmidt.)

Mr. Cahill: Yes, I think we did in some way on that. I am not clear on that.

The Referee: Did your amended schedules include this [13] property?

Mr. Cahill: That I do not recall, your Honor, and I do not have that file here this morning.

Mr. Blanche: I think the first time that it came to Mr. Cahill's attention, was when we began to press concerning the payment of the promissory note and the vendor's lien.

The Referee: There is no question but what title was transferred to this corporation?

Mr. Blanche: No, but my point is of course there was no estoppel on anybody's part, because no one ever depended on the title to this property being in the name of the corporation. Also, I believe it goes to the question of the alter ego as well.

The Referee: Well, after the title was conveyed to Kenneth P. Schmidt Builders, Inc., it was never thereafter transferred to anyone else by the Kenneth P. Schmidt Builders, Inc., was it?

The Witness: No, sir, nor was it encumbered.

The Referee: The next question, please.

Q. (By Mr. Blanche): Did you tell Mr. MacArthur that you were the sole owner of the corporation?

A. I do not recall. I don't remember any such conversation.

Q. Would you state that you did not tell him that you were the sole owner of the [14] corpora-

(Testimony of Kenneth P. Schmidt.)

tion? A. No, I wouldn't say that either.

The Referee: Do you recall any conversation along that line with any of the people connected with this matter?

The Witness: No, sir.

Q. (By Mr. Blanche): Well, when you talked about placing the property in the name of the corporation for the purpose of doing this building and signing a note, wasn't there something said about that at that time, that you were the sole owner of the corporation?

A. I don't recall. I don't recall any such conversation.

Q. You saw some of the letters that were sent by Mr. MacArthur to the Polikowskys?

A. Yes, sir.

Q. Do you recall having seen this letter of October 24, 1952?

A. Why, I cannot recall seeing this letter, I had several letters from Mr. MacArthur directed to me, but I can't say that I read a copy of this.

Mr. McDonnell: Well, counsel, have you made it clear that this is not that type of letter that Mr. Schmidt is referring to, that is not one sent to him? You are not contending this letter was sent to Mr. Schmidt, are you?

The Referee: No, but the question was does he recall seeing this letter.

The Witness: I do not recall seeing this [15] letter.

Q. (By Mr. Blanche): He sent you copies on

(Testimony of Kenneth P. Schmidt.)

occasion of letters he sent to Mr. and Mrs. Polikowsky, did he not, or you saw the letters that he sent to Mr. and Mrs. Polikowsky?

A. No, he sent letters to me keeping me advised as to the negotiations, but I do not recall having seen this letter.

Q. Well, did he send you copies of letters he sent to them in order to keep you advised as to the negotiations?

A. I do not remember having received any, although he kept me posted by letters on the negotiations, directly to me.

Mr. Blanche: That is all.

Redirect Examination

By Mr. McDonnell:

Q. Mr. Schmidt, under cross-examination you have been asked if you encumbered this property in any way and you answered, no. Was there some reason you did not borrow the money?

Mr. Blanche: To which I object.

Mr. McDonnell: The matter has been opened up on cross-examination.

The Referee: Oh, yes, it is a perfectly proper question. You opened it up.

Mr. Blanche: I didn't open up as to why he didn't encumber it, if your Honor please.

The Referee: You asked him if he did and he said, no. [16] It is perfectly proper.

The Witness: The reason the property was not

(Testimony of Kenneth P. Schmidt.)

encumbered was the fact we were approximately three weeks or 30 days from completing our engineering and having the map recorded under the State Subdivision Act, which is a requirement prior to recordation of any encumbrance for construction loan purposes.

Mr. McDonnell: I see. That is all the questions I have—just one second.

Q. Mr. Schmidt, are you now the sole owner of all the stock of Kenneth P. Schmidt Builders, Inc.?

Mr. Blanche: He has already testified that he was.

The Referee: Yes.

The Witness: Well, I would like to correct that.

Mr. Cahill: He couldn't so testify because he never has been.

The Witness: I never have made that statement, I don't believe.

Mr. Blanche: May I call the Court's attention to——

Mr. McDonnell: Well, I think that would go to the weight of the evidence rather than to its admissibility.

The Referee: Well, this theory of alter ego don't appeal to me at all because you have got to go beyond the mere fact that a man owns all the stock of a corporation to raise the alter ego theory. You have to show some inequity, fraud or injustice would be committed. You have [17] shown nothing of that kind yet. You will find cases which hold that the

(Testimony of Kenneth P. Schmidt.)

mere fact that a man owns all the stock of a corporation is not grounds for disallowance of his claim in bankruptcy. It is the same proposition. If you think you can show there is any fraud, inequity or injustice in Mr. Schmidt's dealings with the public and with your people, assuming he owned all the stock, that is one thing, but you haven't done that.

(Argument and discussion between the Court and counsel.)

The Referee: Well, let's see now. This case says if the vendor does any act manifesting an intention on his part not to rely on the lien.

All right, what did they do here? First of all, they agree that he can put construction loans on the property and he could put enough on there to absorb the value of the property. All right, they said we will take a second deed of trust, it might be worthless, but they changed that then. They said, "Well, we won't require a second deed of trust. We will rely on his personal signature and his wife's signature."

What more could they do to manifest an intention to waive their vendor's lien? And then there is also the contents of those escrow instructions that say it shall be free of all liens except taxes and assessments, and there is one California case right on the point which says that is a waiver of the vendor's lien. [18]

Mr. Blanche: Well now, I want to go into that,

(Testimony of Kenneth P. Schmidt.)

if the Court please, too. I am going to insist on this corporate alter ego——

The Referee: Well, you will have to do that with some other court. That is your privilege, but I think you are barking up the wrong tree.

Mr. Blanche: I do want the record to show. Of course, the question was whether or not Mr. Schmidt was the alter ego of the corporation.

Mr. McDonnell: No, the question was is he or is not the owner of all the stock.

Mr. Blanche: I am objecting to that. I say that has already been asked and answered.

The Referee: No, we will take the testimony again. Let's get the facts. You might use that transcript for impeachment, if you wish.

Q. (By Mr. McDonnell): Mr. Schmidt, do you at the present time own all the stock of the Kenneth P. Schmidt Builders, Inc.?

Mr. Blanche: Well, what he owns at the present time is incompetent.

The Referee: Not at the present time, but at the time of this transaction.

Q. (By Mr. McDonnell): At the time of the purchase of the property from the Polikowskys, did you own all the capital stock of Kenneth P. Schmidt Builders, Inc.? [19]

A. No, sir, but I would like to explain to clear up the whole thing about the ownership of the stock exactly.

The Referee: Go ahead.

(Testimony of Kenneth P. Schmidt.)

Q. (By Mr. McDonnell): As of that time now this is.

A. There has only been one condition of the stock since its inception, but I would like to explain it before the Court.

The Referee: Go ahead.

Mr. McDonnell: Go ahead.

The Witness: I held all of the stock when the corporation was formed in my name and it was kept in Thomas Walker's office, the attorney. He formed the corporation. For a certain period—then a certain period passed and my two brothers were working for me, one running the Paint Department and the other one running carpenters, and so forth, and they expressed a desire to own part of the corporation. So I sold approximately 20 per cent of the stock to my father. Now, I don't know where the stock is. I asked Mr. Cahill about four months ago. I don't think he knows.

The Referee: Did you sell it to your father before this Polikowsky transaction?

The Witness: Yes.

The Referee: Go ahead now.

The Witness: And I gave my brothers an option after a certain period, if they had the money and did right, they could own some of the stock. But the only transfer of stock [20] has been to my father, 20 per cent of it.

Q. (By Mr. McDonnell): Your brothers did not exercise the option?

(Testimony of Kenneth P. Schmidt.)

A. No, sir. I don't know where the stock is. Maybe it is still in Tom Walker's office.

The Referee: How much of the stock did your brother get?

The Witness: He didn't get any. He got an option. The only stock that has been transferred, was to my father.

The Referee: Then when you dealt with the Polikowskys, you held 80 per cent and your father 20 per cent of the stock; is that right?

The Witness: Yes, sir, and if I made the other statement I didn't understand it.

Mr. McDonnell: I have no further questions.

The Witness: I think the thing I told Mr. MacArthur was that I controlled the corporation.

Recross-Examination

By Mr. Blanche:

Q. Well, I would like to read your testimony taken before this Referee——

The Referee: Let him read it first and then you can question him about it.

Q. (By Mr. Blanche): On Tuesday, November 19, 1953, reading about line 14, page 10.

A. Well, if I said it I said it, but it is [21] not——

The Referee: No, just answer the questions now. Have you read it?

The Witness: Yes, sir.

The Referee: All right, now, wait for Mr. Blanche.

(Testimony of Kenneth P. Schmidt.)

Mr. Cahill: I will ask the witness to read starting at line 11, not line 14. It sets a certain time, December 5, 1952.

The Referee: What page is it?

Mr. Cahill: Page 10, your honor. There is a limitation of time that is long after the Polikowsky transaction.

Mr. Blanche: Oh, well, wait, Mr. Cahill. Just read the testimony.

The Referee: Just ask your question, Mr. Blanche.

Mr. Blanche: I will read the whole thing.

The Witness: I have read it.

Mr. Blanche: (Reading.)

“The Referee: When you say at that time, are you referring to the date of December 5, 1952?”

“The Witness: Yes, sir.

“Q. (By Mr. Blanche): Do you know who the stockholders were at that time?”

“A. There has been only one stockholder, and that is myself.

“Q. Do you own all of the stock of the corporation? A. Yes, sir.”

Q. You gave that testimony at that time, did you not? [22] A. Yes, sir.

The Referee: Have you any explanation to make of it now?

The Witness: Yes, I do, your Honor. I would like to explain it.

The Referee: Take your time and explain it.

The Witness: It is a peculiar situation. After my father purchased stock, he paid \$20,000 for

(Testimony of Kenneth P. Schmidt.)

it and then the corporation—he decided to get out or go into some other deal, he was dissatisfied with it, and I had a piece of property in Glendora I was ready to subdivide, consisting of about 90 lots, and I said, “Here is a chance to make around a hundred thousand dollars”; and I said, “I will tell you what I will do, you invested in the corporation and you would like to have some profit on the transaction and I will trade you the Glendora subdivision deal, which is all ready to start, for your stock back.”

And I said, “Furthermore, you are my father, it is such a good deal I will guarantee you if you lose money on the building project, I will still return your \$20,000. I don’t want you to lose any money.”

So we made a verbal deal and the subdivision was developed successfully. So morally I feel that he has been repaid for his stock and I own all the stock, although I do not hold it. It is one of those transactions that hasn’t been completed. [23]

The Referee: Does he still have the stock certificate?

The Witness: Well, I think it is in Mr. Walker’s office. I do not know.

The Referee: Who is Mr. Walker?

The Witness: He is the attorney that formed the corporation. So I hope you understand that at that time when I said I owned all the stock, morally I feel that I do, but I do not hold all the shares.

The Referee: All right, the next question.

Mr. Blanche: That is all.

Mr. McDonnell: I have no further questions.

The Referee: All right, you are excused.

Well, we will recess now.

(Recess.)

The Referee: Mr. Cahill, don't you think you ought to amend the schedules? The schedules are incomplete.

Mr. Cahill: Yes, your Honor, I will tell you what I did with that. I conferred with Mr. Laugharn. I conferred with Mr. Laugharn at very great length and discussed the problems there, and particularly those escrows laying out with the Glass Escrow Company in horrible shape. Mr. Laugharn said, "Let us, the Trustee and his attorney, gather everything and we will present that to you and then you prepare amended schedules"; and I agreed to do that.

The Referee: All right. Now, Mr. Blanche, take that [24] alter ego theory of yours, isn't this the answer to it. The alter ego theory is based on this: A man can't own a corporation and mask behind it and then when things go wrong try to limit the creditors to the assets of the corporation, if by doing so it brings about inequity, fraud or injustice. In other words, the corporate veil can be pierced and the man's own assets can be reached.

Now, here what have we got? We have got the corporation. If we pierce the veil and say Mr. Schmidt is the alter ego, you have his assets, too, because he signed the instrument.

So it seems to me that is the complete answer to that corporate veil proposition. Even assuming there was inequity, fraud or injustice, you have got not only the corporation's assets but his and his wife's assets.

(Argument and discussion between the Court and counsel.)

The Referee: All right, let's go ahead.

Mr. Blanche: I will call Mr. MacArthur. The Court has cut me off on my argument on the corporate veil, but I would like this testimony in.

The Referee: I will hear from you later.

H. T. MacARTHUR

called as a witness on behalf of the Petitioners, being first duly sworn, testified as follows:

Mr. Blanche: I have a book from the Title Insurance & [25] Trust Company which designates the form used in their standard title insurance policies, and I discussed this with Mr. Otis, and I have told both Counsel—Mr. Otis is the Chief Counsel for the Title Company—and he tells me their form has not been changed since 1950 and it is the form set forth in this booklet. Both counsel have agreed I can introduce—what I wanted to introduce is Schedule B, which is appended to all standard policies.

The Referee: What has that to do with this case?

Mr. Blanche: The Court has continuously stated

(Testimony of H. T. MacArthur.)

we guaranteed a clear title. We guaranteed to give them——

The Referee: I didn't say you guaranteed anything. I said you are bound by what you say in your instruments.

Mr. Blanche: We agree to give them a standard policy of title insurance.

The Referee: It doesn't say any such thing. It says: "showing title vested in Kenneth P. Schmidt Builders, Inc., a corporation, free of encumbrances, except all general and special taxes, including personal property taxes, including special district levies."

Mr. Blanche: The Court has got to read back of that. Let me read it. "Kenneth P. Schmidt Builders, Inc., will hand you a trust deed and note for \$20,000 as described below."

Now, there has been no change in that except as to the trust deed and note. [26]

"And any additional funds and documents required from me to enable you to comply with these instructions, which you are authorized to use and/or deliver provided on or before November 30, 1952, instruments have been filed for record entitling you to procure Title Insurance & Trust Company Standard Owner's or Joint Protection policy of title insurance, with title company liability for the amount of total consideration on real property in the County of Los Angeles, State of California, viz.," which means namely, title showing free and clear.

(Testimony of H. T. MacArthur.)

The Referee: All right, was there a title policy issued?

Mr. Blanche: I don't care. That is all they agreed to do, give them a title policy showing title free and clear.

The Referee: Oh, no, they agreed to give them title free and clear of liens.

Mr. Blanche: Your Honor, they agreed to give them a Title Insurance & Trust Company policy showing the following—

The Referee: Do you disregard this other provision in here entirely?

Mr. Blanche: That doesn't even make a sentence unless you put that "namely" in there.

The Referee: You say those are conflicting?

Mr. Blanche: Not at all. What does "viz." mean? It means "namely." [27]

The Referee: I know. You mean this clause, "Standard Owner's or Joint Protection policy of title insurance," conflicts with the clause later saying that the title should be vested in the corporation free of encumbrances except all general and special taxes, including personal property taxes, and also including any special district levies?

Mr. Blanche: No, your Honor, it defines what that means. It says, "We will issue a Title Insurance & Trust Company policy showing free and clear of encumbrances, showing the following, namely, free and clear of encumbrances."

The Referee: All right, what is wrong with that? "Free and clear of encumbrances" means, according

(Testimony of H. T. MacArthur.)

to one California case, free and clear of vendor's liens.

Mr. Blanche: I am not making myself clear. They guarantee to give them a title policy showing it free and clear of encumbrances. They don't guarantee to give them title free and clear of encumbrances.

The Referee: Of, that is specious, Mr. Blanche. You know the tile is clear whether the policy is right or wrong.

Mr. Blanche: What they guarantee is record title. I cited a United States Supreme Court case——

The Referee: That don't help you a bit.

Mr. Blanche: They agreed to give them title free and clear of encumbrances of record. You have got to read that whole sentence. [28]

(Argument and discussion between the Court and counsel.)

Mr. Blanche: May I make this added statement, and it is not specious, the title policy says——

The Referee: Can you get a copy here by 2 o'clock?

Mr. Blanche: I don't think so. They will have to make me up one. Mr. Schmidt should have it. One was issued from escrow.

Mr. McDonnell: Was it?

The Referee: I want it in here by 2 o'clock. I want to get this over with. Let's not discuss what is in the policy until we see it. I don't want to hear

(Testimony of H. T. MacArthur.)

any more about it until we get the policy and then we will see if that in any way varies the situation.

Now, if you want to take a few minutes out to call them, or if you want to have a subpoena issued, we will recess for a few minutes.

Mr. Blanche: Well, I can get a subpoena issued in the noon recess, I think.

The Referee: It is the Title Insurance & Trust Company?

Mr. Blanche: Yes.

The Referee: Oh, they are very co-operative.

Mr. Blanche: They are very co-operative.

The Referee: Let them make a copy of it and if there is any expense let the estate pay it. [29]

Mr. Blanche: I may say that I talked to Mr. Lawrence Otis, the Chief Counsel, and he tells me that their title policy carries the Schedule B——

The Referee: I don't care what he says. I have great confidence in Mr. Otis. Whenever I get in trouble I call him, but we are talking about a written instrument and let's see what is in it.

Mr. Blanche: Very well, your Honor.

Mr. Cahill: Your Honor, may Mr. Schmidt be excused? He is working at Newport Beach.

The Referee: It is all right with me unless counsel needs him.

Mr. McDonnell: I don't have any reason for keeping him here. Do you, Mr. Blanche?

Mr. Blanche: I don't think of any reason I need him.

(Testimony of H. T. MacArthur.)

The Referee: All right, you may be excused, Mr. Schmidt.

We will take a short recess in this case while I take up another matter here.

(Recess.)

The Referee: Go ahead now, Mr. Blanche.

Mr. Blanche: Call Mr. MacArthur.

H. T. MacARTHUR

recalled, testified further as follows:

Mr. Blanche: While they are reading this letter I wanted to introduce, I might go ahead. [30]

Direct Examination

By Mr. Blanche:

Q. Mr. MacArthur, you had some discussions with Mr. Schmidt——

The Referee: Let's identify Mr. MacArthur first for the record.

Mr. Blanche: I beg your pardon. He has already testified previously in this case. That is why I didn't.

The Referee: I didn't recall.

Mr. Blanche: I will be glad to do it again.

The Referee: What is your first name?

The Witness: H. T. I haven't testified before.

Q. (By Mr. Blanche): Have you been sworn?

A. Yes, I have been sworn now, I have been here before, but I have not testified.

The Referee: Go ahead now.

(Testimony of H. T. MacArthur.)

Q. (By Mr. Blanche): Mr. MacArthur, you are the Mr. MacArthur who with Mr. Duncan negotiated the sale of this property to Mr. Schmidt?

A. Yes, sir.

Q. And Mr. and Mrs. Polikowsky were your clients; is that correct? A. Yes, sir.

Q. And you recall some discussions which were had between you and Mr. Schmidt, concerning release clauses to be placed in the first trust deed and the like? [31] A. Yes, sir.

Q. Now, do you recall some discussion at that time in connection with some assurance that any houses placed thereon would be completed?

A. Yes, sir.

Q. Will you state what that discussion was?

A. I reported to Mr. Schmidt that Mr. and Mrs. Polikowsky were very much interested in insuring themselves against the possibility of the houses possibly being half completed or mechanic's liens developing wherein it would jeopardize their note that they were taking at that time on a trust deed basis.

The Referee: You are referring now to the trust deed that was contemplated in the original escrow instructions?

The Witness: Maybe it would be easier if I would kind of review briefly the history of this.

The Referee: Why not let him tell the story?

Mr. McDonnell: Surely.

The Witness: Well, your Honor, I haven't read back over it. It is some time ago, but this is what is in my mind. At the outset I was given exclusive list-

(Testimony of H. T. MacArthur.)

ing of this property at a price of \$25,000——

The Referee: You say an exclusive listing. You mean by that you were given an exclusive listing by Mr. and Mrs. Polikowsky?

The Witness: That is right, at a price of \$25,000, on [32] which they agreed to pay me a 5 per cent commission or a 5 per cent fee on any other amount which might be acceptable to them, obtainable through any offers; and Mr. and Mrs. Polikowsky do not spend much time in their Pasadena home, making it necessary for correspondence to some town in Northern California.

So Mr. Schmidt knew a salesman in our office by the name of W. W. Duncan, and I did not know Mr. Schmidt. Mr. Duncan came to me with the verbal proposition from Mr. Schmidt offering to pay \$21,500 for the property, who stated that he was just winding up a large subdivision matter approximating \$900,000 of homes in Monterey Park, and that he would buy this land provided he did not have to pay the money for a period of six months.

It seemed a silly proposition, but it is the duty of us in the real estate business to at least inform the sellers of any propositions obtained. So I wrote to Mr. and Mrs. Polikowsky in this Northern city and explained the offer, together with comments as to who Mr. Schmidt was.

The Referee: Have you got that letter here?

Mr. Blanche: The letters are in, I believe.

Mr. McDonnell: Well, is that the letter of October 5, counsel, which is Petitioners' Exhibit 1?

(Testimony of H. T. MacArthur.)

The Witness: I believe it was about October——

Mr. McDonnell: Let me ask counsel, Mr. MacArthur. We are trying to straighten out the record is all. [33]

The Referee: I will get it here. Petitioners' Exhibit No. 2. That is dated October 10, 1952, addressed to—no, that isn't it.

Mr. McDonnell: There are two letters, one dated October 5 and one dated October 10.

The Referee: Oh, yes, dated October 5, 1952, Petitioners' Exhibit 1, addressed to Mr. and Mrs. Polikowsky. Is that the letter you refer to? Just take a look at it.

The Witness: Yes, sir. Shall I go on?

The Referee: Yes, you go on because that is already in evidence. Go ahead with your story. Then what happened after you sent that letter?

The Witness: Included in that letter, if I remember right, there is a statement to the effect that it would be a complicated legal procedure to consummate the transaction even if Mr. and Mrs. Polikowsky would be interested in the reduced price of \$21,500 from their listing price of \$25,000, and that it would necessitate legal advice and aid beyond the ability of we as realtors to handle; that if such an offer would be acceptable they could accept it with that proviso, that the legal arrangements to insure the completion of the houses and release clause arrangements be made.

So that offer of \$21,500 was accepted subject to the arrangements legally.

(Testimony of H. T. MacArthur.)

I do not remember how much time went by after that, but I would guess in the neighborhood of two weeks, and [34] Mr. Schmidt called on me again, and incidentally, I handled all the matters thereafter. Mr. Duncan had merely told the man about the property at the outset.

Mr. Schmidt reported that it appeared it was going to cost a whole lot more to subdivide the land, put in streets and utilities, and so forth, than had been originally expected. Therefore, having not signed up on any basis and not having put up any deposit, he felt free to alter the offer that he had submitted verbally and that we have relayed by letter to an offer of only \$19,000, and Mr. and Mrs. Polikowsky countered with an offer of \$20,000, which counter——

Q. (By Mr. Blanche): Now, before we go any further, Mr. MacArthur, I will show you a letter of October 24th. Did you write that letter to Mr. and Mrs. Polikowsky? A. Yes.

Q. And that is the letter in which——

A. That is dealing with what I just mentioned.

The Referee: Any objection to the introduction of this?

Mr. McDonnell: No, your Honor.

The Referee: I will receive it in evidence.

Mr. McDonnell: It will be Petitioners' Exhibit 5.

Mr. Blanche: I would like to go into it a little further.

The Referee: This is off the record. [35]

(Testimony of H. T. MacArthur.)

(Discussion off the record.)

The Referee: We will recess now until 2 o'clock and you go in my chambers and get the Title Company on the phone. Will this take very long?

Mr. Blanche: No, it won't.

The Referee: Then you go ahead with this first if you want to.

Q. (By Mr. Blanche): I would like to ask you particularly with reference to page 2, there is a statement in this letter, "The property would be acquired in the name of Kenneth P. Schmidt Builders, Inc. Mr. Schmit is president and sole owner of all the stock. He has stated that he would be willing to personally sign the note in addition to the signature of the corporation."

Now, did you have a conversation with Mr. Schmidt at or about that time?

A. This letter is dated October 24th—

The Referee: He just asked you, if you had a conversation with him at or about that time, yes or no.

Q. (By Mr. Blanche): Prior to that letter?

A. Yes, beginning October 5th.

The Referee: All right.

Q. (By Mr. Blanche): Well, you had a conversation with Mr. Schmidt in connection with the contents of that particular paragraph?

A. Yes, sir. [36]

Q. And what did he say in that regard? Did he say to you that he was the sole owner of the stock?

(Testimony of H. T. MacArthur.)

A. That is right.

Mr. McDonnell: I will object to that. Let's not lead the witness.

The Referee: That is too leading. You ask him what he said. Petitioners' Exhibit 5, I will mark this letter. Just what did he tell you along that line?

PETITIONER'S EXHIBIT No. 5

The MacArthur Co.

Realtors

24 No. Marengo Avenue, Pasadena 1, California

Telephone SYcamore 3-4108

October 24, 1952.

Mr. and Mrs. C. E. Polikowsky,

Box 41,

Happy Camp, California.

Dear Mr. and Mrs. Polikowsky:

Last Wednesday Mr. Kenneth P. Schmidt called in person at our office with the report of his engineers and the City of Pasadena, showing the estimated cost to subdivide including the street, sewers, underground wiring and other utilities at a cost of \$12,700, which is \$2,700 higher than had been tentatively estimated.

\$21,500 less \$2,700, equals \$18,800, the resulting firm amount of Mr. Schmidt's verbal offer to start out with at the time of his call. We suggested that the \$18,800 offer be at least "rounded off" at \$19,000. Then, after obtaining his approval to \$19,000, we

(Testimony of H. T. MacArthur.)

reminded him that some one would have to put up the money for escrow and title company expenses and that it would not appear fair in this particular deal to ask you to pay out money in a deal involving no down payment. We took a rough guess that your share of such expenses in an outright sale at \$150. So, Mr. Schmidt offered to pay his own share of escrow expenses and not to exceed \$150 of your side of such expenses in addition. In effect, that would mean an offer of \$19,150 wherein each party pays his own customary expenses in escrow. In other words, after obtaining his estimates of total costs to subdivide, he now offers \$19,150 on a firm basis, on the general terms and conditions outlined in our letter to you dated October 5, 1952.

Last Wednesday, Mr. Schmidt expected that we would prepare such an offer in formal manner for his signature to mail to you by the next day. After consulting our attorney, we found that legal expense would become involved to draw up such an offer in final detailed manner, covering the bond improvement and special wording pertaining to the note in the amount of \$19,000 after taking Mr. Schmidt's check for the \$150. Hence, it was decided to telephone you the next day, which was yesterday. Not being able to reach you, word was left for a message to be placed in your post office box to call us reverse charges. Evidently, you did not pick up the message until this morning and then it was impossible for either one of us to hear the other and operator informed us that you had requested that

(Testimony of H. T. MacArthur.)

we write you this detailed letter by air mail. In the event you should entertain this offer in the amount of \$19,150, you should be prepared to engage the services of some attorney to represent you in working out the wordings of the \$19,000 note and the improvement bond with Mr. Schmidt's attorney. Hence, when you reply, we should be notified as to the attorney you desire to represent you. If you do not have some particular attorney in mind, as stated before in our letter dated October 5th, we can recommend Mr. Charles M. Fueller who is now already familiar with the type of deal.

You realize that I feel very close to you people, yet the truth is that it is difficult to recommend either a rejection or an acceptance of this offer. While it is true that I am supposed to be a specialist in appraising, it is also true that most appraisals are made by comparison with other similar properties sold on a similar basis—and there just are not other such recent past sales to use as a comparison. After working on this property diligently for some time, we now realize better than at the outset that there are very, very few eligible buyers for property of this kind in the first place; it requires considerable money and/or financial backing to improve the resultant lots to be created, carrying expenses, selling expenses, etc., all topped off by the fact that while this is a beautiful piece of property, it is something like an oasis in that the properties

(Testimony of H. T. MacArthur.)

and occupants not too far distant are not very beautiful.

With your own experience in the building and real estate business, I am inclined to believe that in this case I would prefer to lean on your advice if I were the owner and you were the real estate agent. Mr. Schmidt has not tackled this problem in any quick slipshod manner. He has already incurred expenses in obtaining detailed item cost which he presented to us. If these costs are in line, he would still be paying the same amount of average cost per lot that would have applied if the subdivision costs had been the originally estimated \$10,000 instead of the more accurate estimate he now has of \$12,700.

There would be no other major changes from the proposal contained in our letter of October 5th. Additional minor items would include:

(a) The property would be acquired in the name of: Kenneth P. Schmidt Builders, Inc. Mr. Schmidt is president and sole owner of all the stock. He has stated that would be willing to personally sign the note in addition to the signature of the corporation.

(b) Mr. Schmidt would give us his check for \$150 to be used to apply on immediate title search and opening of escrow costs, but asks that his approval be obtained to the title company preliminary report.

(c) Mr. Schmidt already understands that the zoning is R-I, Class I, and would be purchasing the

(Testimony of H. T. MacArthur.)

property with no question in that regard; his engineers have already satisfied him that the land does not involve any filled-in ground problems, so property would be acquired "as is."

(d) The escrow would be handled by Mutual Savings and Loan Association, the firm he has negotiated with for the financing the construction of the eleven homes.

(e) The \$19,000 note (\$19,150 less the \$150 check), would become due and payable six months from the date of close of escrow, not six months from this date, in accordance with paragraph (4) of our letter of October 5th otherwise.

(f) The only items to be prorated in escrow would be real estate taxes and the 6% interest on the \$19,000 note; prorations would be as of date of close of escrow, not to exceed 30 days from the date of opening the escrow provided that you have complied with everything you agree to do on your side of the agreement.

(g) All fees, charges and prorations to be borne by the seller and the buyer in escrow in the manner customary between sellers and buyers except as agreed to otherwise herein.

(h) The manner of payment of the commission fee in the amount of 5% of the total selling price would be at your option of the following two plans: the commission fee could be paid by you at the close of escrow, or we could take your notes bearing the same interest rate that Mr. Schmidt would be paying on that same amount, 6%, beginning the

(Testimony of H. T. MacArthur.)

interest at the same date and the notes falling due the same date as Mr. Schmidt's note. The reason there would be two notes instead of one is that one of our associates, within this office, developed this prospective dealing, and the commission fee would be divided 60-40, 60% to W. W. Duncan and 40% to The MacArthur Co.

I have purposely written these several pages of detailed information in an effort to post you on all matters; it is best to do so in my opinion wherein I lack the benefit of sitting with you discussing various points.

Kindest personal regards,

/s/ HAROLD T. MacARTHUR.

HTM:t

Received in evidence March 4, 1954.

The Witness: I think I could explain better.

The Referee: No, just tell us what he said to you about the corporate stock of this corporation, Mr. Schmidt.

The Witness: This was news about the corporation——

The Referee: How is that?

The Witness: This was brand new news——

The Referee: No, just tell us what he told you.

The Witness: He said he wanted the title to be vested in the name of the corporation because it was one and the same thing anyway.

(Testimony of H. T. MacArthur.)

The Referee: Because it was what?

The Witness: It was one and the same thing.

The Referee: Well, that is what he told you?

The Witness: Yes.

The Referee: All right, the next question.

Q. (By Mr. Blanche): Well, was there any discussion about bonds? A. Yes, sir. [37]

Q. Bonds for completion of houses?

A. Yes, sir.

Q. And was there a discussion that in the event a release clause would be had with reference to a second trust deed that there should be some bond concerning the completion of the houses?

Mr. McDonnell: Just a moment. I don't want to keep these objections up, but let the witness tell us what Mr. Schmidt said.

The Referee: No, he is directing his attention to some particular matter. He asked him if there was any discussion. The question calls for a yes or no answer.

Mr. McDonnell: All right.

Q. (By Mr. Blanche): You answered yes?

A. Yes.

Q. What was that discussion?

The Referee: Before we get into that, we had better recess until 2 o'clock and you go in my room and telephone Mr. Otis so we can get that paper here at 2 o'clock.

(Whereupon, a recess was taken until 2 o'clock p.m.) [38]

March 4, 1954, 2 P.M.

The Referee: All right, Kenneth P. Schmidt Builders.

Mr. Blanche: If your Honor please, I have a man here from the Title Company with a copy of the title policy.

The Referee: We don't need to put him on the stand. They will stipulate.

Mr. Blanche: Counsel has been very nice to stipulate. I will offer this.

The Referee: Any objection to this copy?

Mr. McDonnell: Not as a copy, but we do not wish to stipulate to its admissibility, your Honor.

The Referee: But as far as this being a copy, that is so stipulated?

Mr. McDonnell: Yes.

Mr. Blanche: I am sure it is. The man is here from the Title Company.

The Referee: You don't need him for anything more.

Mr. Blanche: I want to offer it, if your Honor please.

The Referee: Well, let the man go back to his business now. Go ahead now.

Mr. Blanche: I would like to offer this, if the Court please, as the Petitioners' Exhibit.

The Referee: Any objection?

Mr. McDonnell: Yes. I will object to the introduction of that in evidence, your Honor, on the ground it does [39] not prove or tend to prove any issue in the case. I believe the title policy is irrelevant in this matter.

The Referee: Well, but the escrow instruction calls for this policy to be issued, doesn't it?

Mr. McDonnell: Yes, but I can't see how that determines whether there was a vendor's lien on the property or not.

The Referee: Well, under the circumstances I think it is just as competent as evidence as what you are offering.

Mr. McDonnell: Well, I have made my objection. If your Honor overrules it, all right.

The Referee: Petitioners' Exhibit No. 6.

PETITIONERS' EXHIBIT No. 6

1012 6-53

California Land Title Association

Standard Coverage Policy Form

Copyright 1950

Fee \$85.00

Policy of Title Insurance

Issued by

Title Insurance and Trust Company

of Los Angeles

Title Insurance and Trust Company, a corporation, of Los Angeles, California, herein called the Company, for a valuable consideration paid for this policy of title insurance, the number, date, and amount of which are shown in Schedule A, does hereby insure the parties named as Insured in Schedule A, together with the persons and corporations included in the definition of "the insured" as

set forth in the stipulations of this policy, against loss or damage not exceeding the amount stated in Schedule A which the insured shall sustain by reason of:

1. Title to the land described in Schedule A being vested, at the date hereof, otherwise than as herein stated; or

2. Unmarketability, at the date hereof, of the title to said land of any vestee named herein, unless such unmarketability exists because of defects, liens, encumbrances, or other matters shown or referred to in Schedule B; or

3. Any defect in, or lien or encumbrance on, said title, existing at the date hereof, not shown or referred to in Schedule B; or

4. Any defect in the execution of any mortgage or deed of trust shown in Schedule B securing an indebtedness, the owner of which is insured by this policy, but only insofar as such defect affects the lien or charge of such mortgage or deed of trust upon said land; or

5. Priority, at the date hereof, over any such mortgage or deed of trust, of any lien or encumbrance upon said land, except as shown in Schedule B, such mortgage or deed of trust being shown in the order of its priority in Part Two of Schedule B; all subject, however, to Schedules A and B and the Stipulations herein, all of which schedules and stipulations are hereby made a part of this policy.

In Witness Whereof, Title Insurance and Trust

Company has caused its corporate name and seal to be hereunto affixed by its duly authorized officers on the date shown in Schedule A.

[Seal] TITLE INSURANCE AND
TRUST COMPANY,

By /s/ W. HERBERT ALLEN,
President.

Copy of Policy. No additional liability assumed.
HF

Schedule A

1012A 8-53

California Land Title Association

Standard Coverage Policy Form

Copyright 1950

Amount: \$20,000.00

Policy No.: 3746551

Date: February 10, 1953, at 8 A.M.

Insured

Kenneth P. Schmidt Builders, Inc., a Corporation.

1. The title to said land, is at the date hereof, vested in:

Kenneth P. Schmidt Builders, Inc., a Corporation.

2. Description of land in the county of Los Angeles, state of California, title to which is insured by this policy:

That portion of Lot 1, in Tract 1032, in the city Pasadena, as per map recorded in Book 17, Pages 142 and 143 of Maps, in the office of the county recorder of said county, except that portion thereof described as follows:

Beginning at a 4-inch pipe monument set at the most northwesterly corner of said Lot 1; thence North $82^{\circ} 22' 32''$ east along the northerly boundary line of said Lot 1, a distance of 18.85 feet to a 2 by 2 stake set at the northeasterly corner of said Lot 1, said corner being in the westerly line of Armada Drive, formerly San Rafael Drive, as said drive is shown on said map of Tract 1032; thence southerly along the said westerly line of Armada Drive formerly San Rafael Drive through an arc concave easterly of $44^{\circ} 32' 36''$ having a radius of 135.06 feet, a distance of 105 feet to a 4-inch cement pipe monument set in said westerly line of Armada Drive; thence South $82^{\circ} 25'$ west a distance of 21.65 feet to a 4-inch pipe monument set in the westerly boundary line of said Lot 1; thence North $7^{\circ} 35'$ west along the said westerly boundary line of Lot 1, a distance of 102.32 feet to the point of beginning.

Schedule B

This policy does not insure against loss by reason of the matters shown or referred to in this Schedule except to the extent that the owner of any mortgage or deed of trust shown in Part Two is expressly insured in paragraphs numbered 4 and 5 on page 1 of this policy.

Part One: This part of Schedule B refers to matters which, if any such exist may affect the title to said land but which are not shown in this policy:

1. Taxes or assessments which are not shown as

existing liens by the records of any taxing agency or by the public records; and easements, liens or encumbrances which are not shown by the public records.

2. Rights or claims of persons in possession of said land which are not shown by the public records.

3. Any facts, rights, interests, or claims which are not shown by the public records but which could be ascertained by an inspection of said land, or by making inquiry of persons in possession thereof, or by a correct survey.

4. Mining claims, reservations in patents, water rights, claims or title to water.

5. Any laws, governmental acts or regulations, including but not limited to zoning ordinances, restricting, regulating or prohibiting the occupancy, use or enjoyment of the land or any improvement thereon, or any zoning ordinances prohibiting a reduction in the dimensions or area, or separation in ownership, of any lot or parcel of land; or the effect of any violation of any such restrictions, regulations or prohibitions.

Part Two: This part of Schedule B shows liens, encumbrances, defects and other matters affecting the title to said land or to which said title is subject:

1. Second installment general and special county taxes for the fiscal year 1952-1953 (Code area 4332 Parcel No. 52-29-1). Amount \$206.95.

2. Right for the constructing, placing and repairing of all telephone and electric light poles

along the property line of said land which adjoins the property immediately adjoining Seco Street, no cross-arms or any poles, however, shall extend more than 3-feet over the property line as reserved in deed from The Arroyo Park Corporation, a corporation, recorded in Book 239, Page 68, Official Records.

3. The effect of an instrument declaring said land restricted against occupancy by persons of other than the white or Caucasian races, executed by Angie W. Cox and A. S. Cox, as owners of said land, and by other persons, as owners of other parcels of land in said tract and vicinity, recorded prior to February 15, 1950, in Book 17720, Page 161, Official Records.

Stipulations

1. Scope of Coverage

This policy does not insure against, and the Company will not be liable for loss or damage created by or arising out of any of the following: (a) defects, liens, claims, encumbrances, or other matters which result in no pecuniary loss to the insured; (b) defects, liens, encumbrances, or other matters created or occurring subsequent to the date hereof; (c) defects, liens, encumbrances, or other matters created or suffered by the insured claiming such loss or damage; or (d) defects, liens, claims, encumbrances, or other matters existing at the date of this policy and known to the insured claiming such loss or damage, either at the date of this policy or at the

date such insured claimant acquired an estate or interest insured by this policy, unless such defect, lien, claim, encumbrance or other matter shall have been disclosed to the Company in writing prior to the issuance of this policy or appeared at the date of this policy on the public records. Any rights or defenses of the Company against a named insured shall be equally available against any person or corporation who shall become an insured hereunder as successor of such named insured.

2. Defense of Actions. Notice of Actions or Claims to Be Given by the Insured.

The Company at its own cost shall defend the insured in all litigation consisting of actions or proceedings against the insured, or defenses, restraining orders, or injunctions interposed against a foreclosure of sale of said land in satisfaction of any indebtedness, the owner of which is insured by this policy, which litigation is founded upon a defect, lien, encumbrance, or other matter insured against by this policy, and may pursue each litigation to final determination in the court of last resort. In case any such litigation shall become known to any insured, or in case knowledge shall come to any insured of any claim of title or interest which is adverse to the title as insured or which might cause loss or damage for which the Company shall or may be liable by virtue of this policy, such insured shall notify the Company thereof in writing. If such notice shall not be given to the Company at least two days before the appearance day in any such litigation, or if such insured shall not, in writ-

ing promptly notify the Company of any defect, lien, encumbrance, or other matter insured against, or of any such adverse claim which shall come to the knowledge of such insured, in respect to which loss or damage is apprehended, then all liability of the Company as to each insured having such knowledge shall cease and terminate; provided, however, that failure to so notify the Company shall in no case prejudice the claim of any insured unless the Company shall be actually prejudiced by such failure. The Company shall have the right to institute and prosecute any action or proceeding or do any other act which, in its opinion, may be necessary or desirable to establish the title, or any insured lien or charge, as insured. In all cases where this policy permits or requires the Company to prosecute or defend any action or proceeding, the insured shall secure to it in writing the right to so prosecute or defend such action or proceeding, and all appeals therein, and permit it to use, at its option, the name of the insured for such purpose. Whenever requested by the Company the insured shall assist the Company in any such action or proceeding, in effecting settlement, securing evidence, obtaining witnesses, prosecuting or defending such action or proceeding, to such extent and in such manner as is deemed desirable by the Company, and the Company shall reimburse the insured for any expense so incurred. The Company shall be subrogated to and be entitled to all costs and attorneys' fees incurred or expended by the Company, which may be recoverable by the insured in any litigation carried on by the Company on be-

half of the insured. The word "knowledge" in this paragraph means actual knowledge, and does not refer to constructive knowledge or notice which may be imputed to the insured by the public record.

3. Notice of Loss. Limitation of Action

A statement in writing of any loss or damage for which it is claimed the Company is liable under this policy shall be furnished to the Company within sixty days after such loss or damage shall have been ascertained. No action or proceeding for the recovery of any such loss or damage shall be instituted or maintained against the Company until after full compliance by the insured with all the conditions imposed on the insured by this policy, nor unless commenced within twelve months after receipt by the Company of such written statement.

4. Option to Pay, Settle, or Compromise Claims

The Company reserves the option to pay, settle, or compromise for, or in the name of, the insured, any claim insured against or to pay this policy in full at any time, and payment or tender of payment of the full amount of this policy, together with all accrued costs which the Company is obligated hereunder to pay, shall terminate all liability of the Company hereunder, including all obligations of the Company with respect to any litigation pending and subsequent costs thereof.

5. Subrogation Upon Payment or Settlement

Whenever the Company shall have settled a claim under this policy, it shall be subrogated to and be entitled to all rights, securities, and remedies which

the insured would have had against any person or property in respect to such claim, had this policy not been issued. If the payment does not cover the loss of the insured, the Company shall be subrogated to such rights, securities, and remedies in the proportion which said payment bears to the amount of said loss. In either event the insured shall transfer, or cause to be transferred to the Company such right, securities, and remedies, and shall permit the Company to use the name of the insured in any transaction or litigation involving such rights, securities, or remedies.

6. Option to Pay Insured Owner of Indebtedness and Become Owner of Security

The Company has the right and option, in case any loss is claimed under this policy by an insured owner of an indebtedness secured by mortgage or deed of trust, to pay such insured the indebtedness of the mortgagor or trustor under said mortgage or deed of trust, together with all costs which the Company is obligated hereunder to pay, in which case the Company shall become the owner of, and such insured shall at once assign and transfer to the Company, said mortgage or deed of trust and the indebtedness thereby secured, and such payment shall terminate all liability under this policy to such insured.

7. Payment of Loss and Costs of Litigation. Indorsement of Payment on Policy.

The Company will pay, in addition to any loss

insured against by this policy, all costs imposed upon the insured in litigation carried on by the Company for the insured, and in litigation carried on by the insured with the written authorization of the Company, but not otherwise. The liability of the Company under this policy shall in no case exceed, in all, the actual loss of the insured and costs which the Company is obligated hereunder to pay, and in no case shall such total liability exceed the amount of this policy and said costs. All payments under this policy shall reduce the amount of the insurance pro tanto, and payment of loss or damage to an insured owner of indebtedness shall reduce, to that extent, the liability of the Company to the insured owner of said land. No payment may be demanded by any insured without producing this policy for indorsement of such payment.

8. Manner of Payment of Loss to Insured

Loss under this policy shall be payable, first, to any insured owner of indebtedness secured by mortgage or deed of trust shown in Schedule B, in order of priority therein shown, and if such ownership vests in more than one, payment shall be made ratably as their respective interests may appear, and thereafter any loss shall be payable to the other insured, and if more than one, then to such insured ratably as their respective interests may appear. If there be no such insured owner of indebtedness, any loss shall be payable to the insured, and if more than one, to such insured ratably as their respective interests may appear.

9. Definition of Terms

The following terms when used in this policy mean: (a) "named insured"; the persons and corporations named as insured in Schedule A of this policy; (b) "the insured": such named insured together with (1) each successor in ownership of any indebtedness secured by any mortgage or deed of trust shown in Schedule B, the owner of which indebtedness is named herein as an insured, (2) any such owner or successor in ownership of any such indebtedness who acquires the land described in Schedule A or any part thereof, by lawful means in satisfaction of said indebtedness or any part thereof, (3) any governmental agency or instrumentality acquiring said land under an insurance contract or guarantee insuring or guaranteeing said indebtedness or any part thereof, and (4) any person or corporation deriving an estate or interest in said land as an heir or devisee of a named insured or by reason of the dissolution, merger, or consolidation of a corporate named insured; (c) "land": the land described specifically or by reference in Schedule A and improvements affixed thereto which by law constitute real property; (d) "date": the exact day, hour and minute specified in the first line of Schedule A (unless the context clearly requires a different meaning); (e) "taxing agency": the State and each county, city and county, city and district in which said land or some part thereof is situated that levies taxes or assessments on real property; (f) "public records": those public records which, under the

recording laws, impart constructive notice of matters relating to said land.

10. Written Indorsement Required to Change Policy

No provision or condition of this policy can be waived or changed except by writing indorsed hereon or attached hereto signed by the President, a Vice President, the Secretary, or an Assistant Secretary of the Company.

11. Notices, Where Sent

All notices required to be given the Company and any statement in writing required to be furnished the Company shall be addressed to it at the office which issued this policy.

Received in evidence March 4, 1954.

Mr. Blanche: I will call Mr. MacArthur again.

H. T. MacARTHUR

recalled, testified further as follows:

Direct Examination
(Resumed)

By Mr. Blanche:

Q. I believe you testified this morning in connection with the letter and were testifying with reference to any question concerning completion bonds with reference to houses to be built by Mr. Schmidt. Was there any discussion between you and Mr. Schmidt about bonds, completion bonds?

(Testimony of H. T. MacArthur.)

A. Considerable.

Q. And was that immediately prior to the amendment of the escrow instructions, that is a matter of weeks before the amendment of the escrow instructions? [40]

A. That is right.

The Referee: Was it between the original and the amended escrow instructions, or before the original instructions?

The Witness: The beginning of the whole deal, before we even went to escrow.

The Referee: That is what we want to know.

Q. (By Mr. Blanche): Was there any discussion after the first instructions were put in about completion bonds?

A. Yes.

Q. And what was the discussion, that is between you and Mr. Schmidt?

A. Mr. Schmidt telephoned me to state that it was impossible to even obtain a bond backing up actual completion of the contemplated several houses, which I verified by checking with insurance companies, and I found that it is possible to get a contractor to build a house for you and to get a bond guaranteeing the completion, but that in this particular case it might not be that there would even be any houses built.

Q. Was there any discussion had between you and Mr. Schmidt whereby the desire of the Polikowskys in connection with bonds was discussed?

Mr. McDonnell: Just a moment. I will object to that question unless it is answered yes or no.

(Testimony of H. T. MacArthur.)

The Witness: I didn't hear it anyway. [41]

(Record read as follows: "Q. Was there any discussion had between you and Mr. Schmidt whereby the desire of the Polikowskys in connection with bonds was discussed?")

The Witness: Yes.

Q. (By Mr. Blanche): What was that discussion, the discussion between you and Mr. Schmidt concerning what the Polikowskys wanted, if anything?

Mr. McDonnell: I am going to object because there is insufficient foundation. We can't tell when this discussion took place, your Honor.

The Referee: You can find out preliminarily where it took place and who was present and when.

Q. (By Mr. Blanche): You have heard the testimony of Mr. Schmidt with reference to telephone conversations and conversations with you; is that right? A. Yes.

Q. Now, do you recall at any particular time when any conversation in connection with the desirability on the part of the Polikowskys for completion bonds was discussed with Mr. Schmidt? Can you identify the place of the conversation?

A. In my office, prior to going to escrow.

Q. Was Mr. Schmidt personally present or did he talk to you on the telephone?

A. Well, there was more than one conversation. The [42] last time was when he called me to tell me it couldn't be done.

(Testimony of H. T. MacArthur.)

Q. And was that prior to the amendment of the escrow instructions? A. Yes.

The Referee: Well, was that prior to the original instructions?

The Witness: Yes, sir. May I explain it this way, that I went over without the benefit of either the buyer or seller being present to dictate the preparation of the instructions, and at that time I provided for the understanding that there would be a bond to guarantee completion inasmuch as Mr. Polikowsky did not want to risk any mechanic's liens and so forth. You see, he is a contractor by profession, Mr. Polikowsky is.

The Referee: I understand. Next question.

Q. (By Mr. Blanche): And finally it was determined that that type of a completion bond could not be obtained; is that right?

A. That is right.

Q. Now, was that before or after the agreement was first put in escrow? As I understand it, you said that the first agreement provided for a completion bond, the first escrow instructions?

A. Yes.

The Referee: Is that right? [43]

Mr. Blanche: He just got through testifying to that.

The Referee: I know, but he might be mistaken.

The Witness: It was not agreed to.

The Referee: You are right, the original escrow

(Testimony of H. T. MacArthur.)

instructions provide this: "The acceptance by the seller of the bond or bonds put up by the buyer to guarantee the completion of the street and utility improvements on the property."

The Witness: Yes.

Mr. McDonnell: Let me ask the witness a question on voir dire, your Honor.

The Referee: Go ahead.

Mr. McDonnell: Mr. McArthur, when you say "completion bonds," do you refer to street improvement bonds or do you refer to a bond guaranteeing the completion of the homes?

The Witness: Two bonds, one for the completion of the tract, which is necessary by law, the other for completion of all the houses.

Mr. McDonnell: And when you say "completion bond," which of the two do you refer to?

The Witness: By "completion bond," I mean for the completion of the erection of the houses.

Mr. McDonnell: I see.

The Referee: But you look at these instructions now.

The Witness: That was not agreed to, your Honor. I went over and dictated that and Mr. Schmidt telephoned me, [44] which is the call I referred to a moment ago, stating that was impossible. No one had signed yet.

The Referee: The only thing in the escrow instructions concerning bonds was this about streets and utilities, no completion bonds.

Go ahead now. Next question, Mr. Blanche.

(Testimony of H. T. MacArthur.)

Q. (By Mr. Blanche): And after that the escrow instructions were subsequently amended; is that right?

A. You mean about the release clauses?

Q. About deleting the——

The Referee: He is referring now to——

The Witness: To what I call completion bonds?

The Referee: He is referring now to what is known here as Petitioners' Exhibit 4 entitled "Amended Escrow Instructions," dated December 5, 1952. You remember that, don't you?

The Witness: Yes.

The Referee: Now, what is your question?

Q. (By Mr. Blanche): At that time there was no longer any possibility of obtaining completion bonds? A. That is right.

Q. You had a discussion with Mr. Schmidt and with Mr. Polikowsky? A. That is right.

Q. Did you discuss with Mr. Schmidt the requirement that there be completion bonds if they were to take a first [45] deed of trust, that is, if they were to take the property subject to a first deed of trust?

A. That is right, at the outset.

Q. And it became no longer possible to get a completion bond? A. That is right.

Q. When was it decided that—or was it a result of that discussion with reference to bonds or was it a result of something else that you had determined not to take a second trust deed at all?

A. Well, it was determined as a result of two

(Testimony of H. T. MacArthur.)

things, and that was one of the two things

The Referee: What was the other one?

The Witness: It was going to be quite difficult to arrange for the so-called release clauses and when he would put on loans to build these——

The Referee: These were construction loans?

The Witness: The property had not been subdivided yet and we didn't know the number of lots that would exist. It would be impossible to sell the property without having specific lot numbers to refer to for releases on payment of certain amounts, and that, together with not being able to arrange for completion bonds for the buildings, made it appear as though the deal would be absolutely impossible on the basis we had started out. We couldn't refer to any legal descriptions for respective lots even. [46]

The Referee: Well, your original escrow instructions referred to construction loans and the amended instructions do not delete that clause.

The Witness: It eliminated it.

The Referee: What?

The Witness: There is nothing about any release clauses in the amended escrow instructions.

The Referee: I don't mean release clauses. I mean construction loans.

The Witness: In other words, he didn't ever have to build on it at all.

The Referee: No, but the original escrow instructions, they provide—here is the way it reads: "It is un-

(Testimony of H. T. MacArthur.)

derstood that the above trust deed will be subordinated to the lien of 11 construction loans made by any Savings & Loan Association, made by the buyer for the construction of improvements on property. Subordination agreement to be incorporated in deed of trust when recorded.”

You recall that instruction, don't you?

The Witness: Yes.

The Referee: Now, when you had the amended instructions that clause was not deleted, it still remained because the amendment did not refer to it. You just look at it. In other words, he still was to be allowed to get construction loans. The only deletions, you see, or the only deletion was the deed of trust to be subordinated to construction [47] loans. That was to be left out.

The Witness: It says all references to the trust deed and note for \$20,000 are deleted. In other words, it would not be possible to subordinate it.

The Referee: In other words, the trust deed was eliminated.

The Witness: That is right.

The Referee: But the construction loan proposition still remained?

Mr. Blanche: Well, if the Court please, there is no purpose in worrying about construction loans unless they have——

The Referee: I can't help it. I am going by the instruments themselves. It is Greek to me.

The Witness: I don't believe I got your point clear.

(Testimony of H. T. MacArthur.)

The Referee: Try it again.

The Witness: You can say 11 houses but you can't have 11 legal descriptions when it hasn't been subdivided.

The Referee: I understand all that.

The Witness: So it would be impossible to arrange for those clauses.

The Referee: To arrange for construction loans?

The Witness: Yes. You see, this is 5 acres.

The Referee: I don't care whether you could arrange for it or not. The original instructions called for construction loans. The amendment did not delete that. I can't [48] read it any other way.

Next question.

Mr. Blanche: That is all.

The Referee: Cross-examination.

Cross-Examination

By Mr. McDonnell:

Q. I don't know about other persons in this courtroom, Mr. MacArthur, but I am not clear on some of the testimony you have given. So let's see if I can clarify it in my own mind.

Now, you have told us about the time between the first escrow instructions and the amended escrow instructions. Is that right? Have you been examined concerning that period?

A. That is right. I am doing the best I can from memory.

Q. I appreciate that. It is probably my confusion, not yours. Do I understand your testimony

(Testimony of H. T. MacArthur.)

that the change was made from the first to the second escrow instructions because there was no legal description? Is that the reason?

A. Two reasons.

Q. Yes. What were they?

A. I am trying to repeat it just like I did. No. 1, it turned out to be impossible to obtain such a thing as I am calling a completion bond for the completion of the houses. No. 2, it would be impossible to provide in advance for release clauses to 11 different parcels without having [49] the benefit of any description of what they would be. They could be cut up into 11 parcels in every old way possible, yet it is necessary in advance when he would obtain individual Building & Loan Company loans on 11 parcels to have that knowledge in order to be able to release those certain portions.

Q. Well, now, as to the so-called construction bonds, didn't I understand your testimony that you knew before the first escrow instructions that it was not going to be possible to get construction bonds? Wasn't that your testimony?

A. No. What I believe happened is that they just typed it over again since it wasn't signed. I went in and gave instructions and no one signed it and Mr. Schmidt called me and said it was impossible.

Q. Well, before the first escrow instructions were signed you knew they couldn't get construction bonds?

A. Yes.

(Testimony of H. T. MacArthur.)

The Referee: Don't call it construction bonds. Call it completion bonds.

Mr. McDonnell: Completion bonds. I'm sorry.

Q. Now, if it was known before the first escrow instructions were signed, how could it have had any effect on the changes which occurred when the second instructions were signed, the changes?

A. How could it have had any effect—— [50]

Q. I mean, here is something you knew before the first instructions were signed. How could that have affected the signing of the amendment to the escrow instructions?

A. In this way, that either the deal had to be cancelled entirely or else take a personal note. It wouldn't be possible to complete the deal the first way.

Q. You mean——

A. The way all my letter correspondence and everything and the deal had been prepared.

Q. So you set up a new way in the first escrow instructions?

The Referee: Let me get this clear now. You say either the deal had to be cancelled or it could be put through by taking a personal note?

The Witness: That is right.

The Referee: And that is what happened, wasn't it?

The Witness: Yes. It would not be possible on our original plan to take a trust deed with release clauses.

The Referee: I see.

(Testimony of H. T. MacArthur.)

Q. (By Mr. McDonnell): Now, did you and Mr. Schmidt discuss the change from the first escrow instructions to the second escrow instructions?

A. Yes.

Q. And you discussed those changes after the first escrow instructions were signed; is that right?

A. More than once. [51]

Q. Can you recall the substance of those conversations, what was said?

A. Well, the first one I mentioned is when he phoned me, and it was news to me that the so-called completion bonds are not obtainable. I write insurance in a very small way, and so I checked with——

Q. That is before the first escrow instructions, isn't it?

A. This is the escrow that was prepared that no one signed.

Q. That is right. I want to know what happened after the first escrow was signed?

A. After the first escrow was signed?

Q. Right.

A. The first escrow was signed by the seller and about two months or so went by before Mr. Schmidt even showed up to do any signing, and then he wanted an extension of time, I believe it was, twice. There wasn't any more discussion I can remember as far as the note or anything like that was concerned except for the prolonging of the six months' period from beginning to another date. I believe that would be about all.

Q. Was there any discussion about deletion of

(Testimony of H. T. MacArthur.)

the second trust deed after the first instructions were signed by the Polikowskys?

The Referee: What do you mean by the first trust deed? [52]

Mr. McDonnell: I mean second trust deed, after the first instructions were signed.

The Witness: It is hard to remember just exactly the date.

The Referee: Well, can this recall it to your attention? The original instructions call for a trust deed, didn't they, in favor of the Polikowskys?

The Witness: Yes.

The Referee: The amended instructions deleted that, cut that out?

The Witness: Yes.

The Referee: Now, was there any talk in between?

The Witness: Yes. I'll tell you, your Honor, I heard Mr. Schmidt testifying this morning. I could tell that he was trying his best also to remember, but he was a little bit in error in that, I believe, he testified that he suggested this personal note.

The Referee: You are the one that suggested it?

The Witness: Yes.

The Referee: I see.

Q. (By Mr. McDonnell): And what did you say when you suggested the personal note?

A. Just about what I said a little while ago, that it would seem——

The Referee: The deal could not be handled any other way? [53]

(Testimony of H. T. MacArthur.)

The Witness: The deal could not be handled any other way. We wouldn't have any descriptions.

Q. (By Mr. McDonnell): And did you suggest he obtain his wife's signature on the personal note instead of the second trust deed?

A. The very earliest correspondence, my letters showed that he volunteered that from the outset.

Q. But that wasn't on the first escrow instructions. I am trying to find out did you suggest that his wife sign instead of the second trust deed?

A. I'm beginning to remember some of this now. I believe the instructions sat there about two months without any signing on his part, and then he required some changes after it had been sitting there a long time, and then I do believe also that he alone went in and signed to start out with and that no one else signed except Mr. Schmidt personally for quite a spell.

The Referee: Well, did he sign personally or for the corporation?

The Witness: I wouldn't swear. I believe he just signed personally.

Mr. Blanche: He signed personally and for the corporation.

Mr. McDonnell: Both on the first escrow instructions.

Mr. Blanche: Both, individually and for the corporation. [54]

The Witness: I don't believe his wife did.

Mr. Blanche: Not on the first one, on the second one.

(Testimony of H. T. MacArthur.)

Q. (By Mr. McDonnell): Now, I call to your attention—you say there was a time lapse of about two months. The first escrow instruction was dated October 30th. The amendment was dated December 5th. That is a period of about a month and five or six days, something like that. A. Yes.

Q. Now, how long would you say that the first escrow instructions were unsigned now in view of the dates that are on them?

The Referee: That is unimportant.

Mr. McDonnell: Well, I want to try and establish when the conversations took place, your Honor. That is all.

The Referee: Yes, but we are getting a pretty clear picture here.

The Witness: I might have been mistaken in my estimate.

The Referee: It was some time anyway, some weeks.

Q. (By Mr. McDonnell): How long would you say after the first instructions were signed the second instructions were dictated?

A. After the first escrow instructions were signed by who?

Q. All right, by Mr. Schmidt? I show you Petitioners' [55] Exhibit 3, dated October 30, that is Escrow Instructions No. 1. A. Yes.

Q. How long after they were signed by Mr. Schmidt was it before the amended instructions, dated December 5, 1952, were prepared?

(Testimony of H. T. MacArthur.)

Mr. Blanche: I wonder if he knows when they were signed by Mr. Schmidt?

Mr. McDonnell: He testified two months, and that is what I am trying to find out.

Mr. Blanche: No, he testified they remained unsigned for about two months.

Mr. McDonnell: That is right.

The Referee: I don't think that makes any difference.

Mr. Blanche: I will withdraw any objection.

Mr. McDonnell: I will withdraw the question. May I have the other exhibits, if your Honor please?

The Witness: Is it all right if I say something?

The Referee: No, wait until they ask you a question.

Mr. McDonnell: May I crave the Court's indulgence just a second while I go through this exhibit?

The Referee: Yes.

Q. (By Mr. McDonnell): Mr. MacArthur, after you talked to Mr. Schmidt about the deletion of the second trust deed, did you communicate with the Polikowskys?

A. I either communicated or else they dropped in on [56] me in person.

Q. And did you discuss with them the fact that Mrs. Schmidt was going to sign in place of the second trust deed?

A. I had them go to escrow with Mr. Charles Fueller, and from the very outset, I believe it was

(Testimony of H. T. MacArthur.)

Paragraph 5, way back October 4th, my deal in making this commission was contingent upon being fully satisfied as to the legal arrangements. So that has always been my understanding, that it takes precedence over escrow instructions anyway.

Q. I must not have made my question clear to you. Let me rephrase it again. Did you discuss with the Polikowskys the changes which Mr. Schmidt proposed in the escrow instructions after the first ones were signed?

A. I stayed out of that because it is a legal question, although I do believe now that I reported that to Mr. Fueller, who advised them in that regard, and they went to escrow accompanied by Mr. Fueller.

Q. Had you advised them before they went to escrow with Mr. Fueller about the proposed changes in the escrow instructions?

A. I do not remember. I remember discussing them with Mr. Schmidt instead of Mr. Schmidt bringing it up to me. It was sort of my idea.

Mr. McDonnell: I think that is all the questions I have.

The Referee: Any redirect? [57]

Mr. Blanche: No redirect.

The Referee: You are excused. The next witness.

Mr. Blanche: That is all.

The Referee: Anything else?

Mr. Blanche: That is all.

Mr. McDonnell: I have no further testimony.

(Testimony of H. T. MacArthur.)

Mr. Blanche: I do have another question, if the Court please, one other question.

The Referee: From this same witness?

Mr. Blanche: From Mr. MacArthur.

The Referee: Go ahead.

Redirect Examination

By Mr. Blanche:

Q. Mr. MacArthur, do you recall any discussion about the period of the note being six months?

A. Yes, sir, from the outset.

Q. And was there any statement made by Mr. Schmidt to you as to where the consideration to pay the note was forthcoming from?

A. Yes, there was.

Q. And what statement did he make in that regard?

A. He stated that he was winding up the completion of a very large subdivision. The figures that he used were approximately \$900,000 worth of houses in the Monterey Park area near the old Middick Country Club, and that he would have the money shortly—six months would be more [58] than ample time; but the funds were going to come from that subdivision he was winding up.

Q. And do you know whether or not that subdivision was in the name of Kenneth P. Schmidt Builders, Inc.?

A. No.

Q. You don't know?

A. I have since heard it was. I have never verified it.

(Testimony of H. T. MacArthur.)

Mr. Blanche: That is all.

Mr. McDonnell: I have no further questions.

The Referee: That is all, Mr. MacArthur. There might be some question there of fraud. Maybe you are mistaken in your remedy there.

You are excused, Mr. MacArthur.

You might think about that, Mr. Blanche. If he made representations payment would be made in a certain way knowing it couldn't be, you might have a case of fraud, some kind of proceeding to set aside the entire transaction.

Mr. McDonnell: Your Honor, before we do close this matter I would like to make my record complete because apparently it will be reviewed. Here is the grant deed from Clarence E. Polikowsky and Winnifred Polikowsky to Kenneth P. Schmidt Builders, Inc., a California corporation.

The Referee: Yes, I think that should be in evidence.

Mr. Blanche: I think it should be. No objection.

The Referee: Trustee's Exhibit 1. [59]

Now, then, examining that policy of title insurance, I presume, Mr. Blanche, your point is that all this policy agrees to do, or what it does not agree to do, put it that way, is to cover easements, liens and encumbrances which are not shown by the public records.

Mr. Blanche: That is correct.

The Referee: Now, a vendor's lien, of course, is never shown by the public records, and your point is that this clause in the original escrow instructions

about title free and so on tied in with the title policy doesn't necessarily mean a waiver of the vendor's lien.

What about that, Mr. McDonnell?

Mr. McDonnell: Well, your Honor, I have inspected the escrow instructions and I think they are subject to another interpretation other than that which Mr. Blanche seeks to put upon them.

It is true the escrow instructions provide in part, "Kenneth P. Schmidt Builders, Inc., will hand you a trust deed and note for \$20,000"—I am reading from the first instructions—"for \$20,000, as described below, and any additional funds and documents required from me to enable you to comply with these instructions, which you are authorized to use and/or deliver provided on or before November 30, 1952, instruments have been filed for record entitling you to procure Title Insurance & Trust Company Standard Owner's or Joint Protection policy of title insurance." [60]

Now, I want you to note the next language: "With Title Company liability for the amount of total consideration on real property in the County of Los Angeles, State of California, viz."

Now, I have consulted Black's Law Dictionary. "Viz." is construed to mean "namely." "Namely" refers not to anything that comes thereafter but to the real property; and you will notice there is a place for it to be described, and then it says: "A portion of Lot 1 of Tract 1032, as per map recorded in Book 17, Page 142-3 of Maps, in the Office of the Recorder of said County, showing title vested in Kenneth P. Schmidt Builders, Inc., a corporation."

Now, there is nothing to restrict, connect, tie, not even the most tenuous vinculum, the next paragraph which begins, I will call to your Honor's attention, with a capital letter indicating a new sentence and a new thought, "Free from encumbrances," and so forth, and that is the portion to which your Honor has had reference.

The Referee: Oh, no; I can't follow that.

Mr. McDonnell: Well, Mr. Blanche is attempting to link the provision for the standard title policy with the section which provides that the title itself will be conveyed free and clear of all encumbrances. I don't think they are bound together in the manner in which Mr. Blanche seek to link them.

Mr. Blanche: They are all in one sentence. There is [61] no predicate as pure rhetoric would require.

Mr. McDonnell: And pure rhetoric would indicate that the next sentence begin with capital letters.

Mr. Blanche: Where is the period?

Mr. McDonnell: The period is intended to be typed in after the "showing title vested in."

Mr. Blanche: That "free" is merely to emphasize. There is no predicate in it.

The Referee: Yes, there would have to be something to base the "free of encumbrances" on.

This will be Trustee's Exhibit No. 1, this deed. Well, I will take the matter under submission.

(Argument and discussion between the Court and counsel.)

The Referee: Well, there is another matter I

have to take up here now, so you find me that case in the meantime, Mr. Blanche.

(Recess.)

Mr. McDonnell: Your Honor, in the Kenneth P. Schmidt matter, may I make this suggestion, perhaps Mr. Blanche could send us a letter with the case in it. Would that satisfy your Honor? And in that way your Honor will have the matter in writing.

The Referee: That will be all right, yes. Then the matter will stand submitted. [62]

Certificate

I, H. A. Singeltary, hereby certify that on the 4th day of March, 1954, I attended and reported, as official court reporter, the proceedings in the above-entitled and numbered matter before the Honorable Reuben G. Hunt, Referee in Bankruptcy, in said Matter, and that the foregoing is a true and correct transcript of the proceedings had therein on said date, consisting of the evidence offered and received, objections of counsel and the rulings of the Court thereon, and that said transcript is a true and correct transcription of my stenographic notes thereof.

Dated at Los Angeles, California, this the 8th day of March, 1954.

[Seal] /s/ H. A. SINGELTARY,

[Endorsed]: Filed March 9, 1954, Referee. [63]
Official Court Reporter.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 84, inclusive, contain the original Creditors' Involuntary Petition in Bankruptcy; Order of General Reference; Adjudication in Bankruptcy; Petition in Support of Order to Show Cause; Answer to Petition for Order to Show Cause; Answer of Kenneth P. Schmidt Builders, Inc., et al.; Memorandum Opinion re Waiver of Vendor's Lien; Findings of Fact, Conclusions of Law and Order on Petition in Reclamation of Clarence E. and Winnifred Polikowsky; Petition and Amended Petition for Review; Certificate on Review; Objections to Findings of Fact, etc.; Findings of Fact, Conclusions of Law and Order on Petition for Review of Referee's Order; Judgment on Petition for Review; Notice of Appeal; Petition and Order Extending Time to Docket Appeal; Statement of Points on Appeal; Designation of Record on Appeal and Affidavit of Service which, together with Reporter's Transcripts of Proceedings on November 19 and 25, 1953, and March 4, 1954, and original Petitioners' Exhibits 1 to 6, inclusive, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and

certifying the foregoing record amount to \$2.00, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this day of December, A.D. 1954.

[Seal]

EDMUND L. SMITH,
Clerk.

[Endorsed]: No. 14606. United States Court of Appeals for the Ninth Circuit. Frank M. Chichester, Trustee in Bankruptcy for the Estate of Kenneth P. Schmidt Builders, Inc., Bankrupt, Appellant, vs. Clarence E. Polikowsky, Winnifred Polikowsky, Kenneth P. Schmidt and Mary Wilkins Schmidt, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 20, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14606

FRANK M. CHICHESTER, Trustee in Bankruptcy for KENNETH P. SCHMIDT BUILDERS, INC., Bankrupt,

Appellant,

vs.

CLARENCE E. and WINNIFRED POLIKOWSKY,

Appellees.

APPELLANTS' STATEMENT OF POINTS
AND DESIGNATION OF RECORD ON
APPEAL

Comes now the Appellant, Frank M. Chichester, Trustee, and hereby adopts in this court the "Appellant's Statement of Points on Appeal" and "Designation of Contents of Record on Appeal," heretofore filed in this matter in the United States District Court, as his statement of points in this court and designation of record in this court.

CRAIG, WELLER &
LAUGHARN,

By /s/ C. E. H. McDONNELL,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 29, 1954.



No. 14606

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK M. CHICHESTER, Trustee in Bankruptcy for the
Estate of KENNETH P. SCHMIDT BUILDERS, INC.,
Bankrupt,

Appellant,

vs.

CLARENCE E. POLIKOWSKY, WINNIFRED POLIKOWSKY,
KENNETH P. SCHMIDT and MARY WILKINS SCHMIDT,

Appellees.

OPENING BRIEF OF APPELLANT.

CRAIG, WELLER & LAUGHARN,
FRANK C. WELLER,
C. E. H. McDONNELL,
THOMAS S. TOBIN,

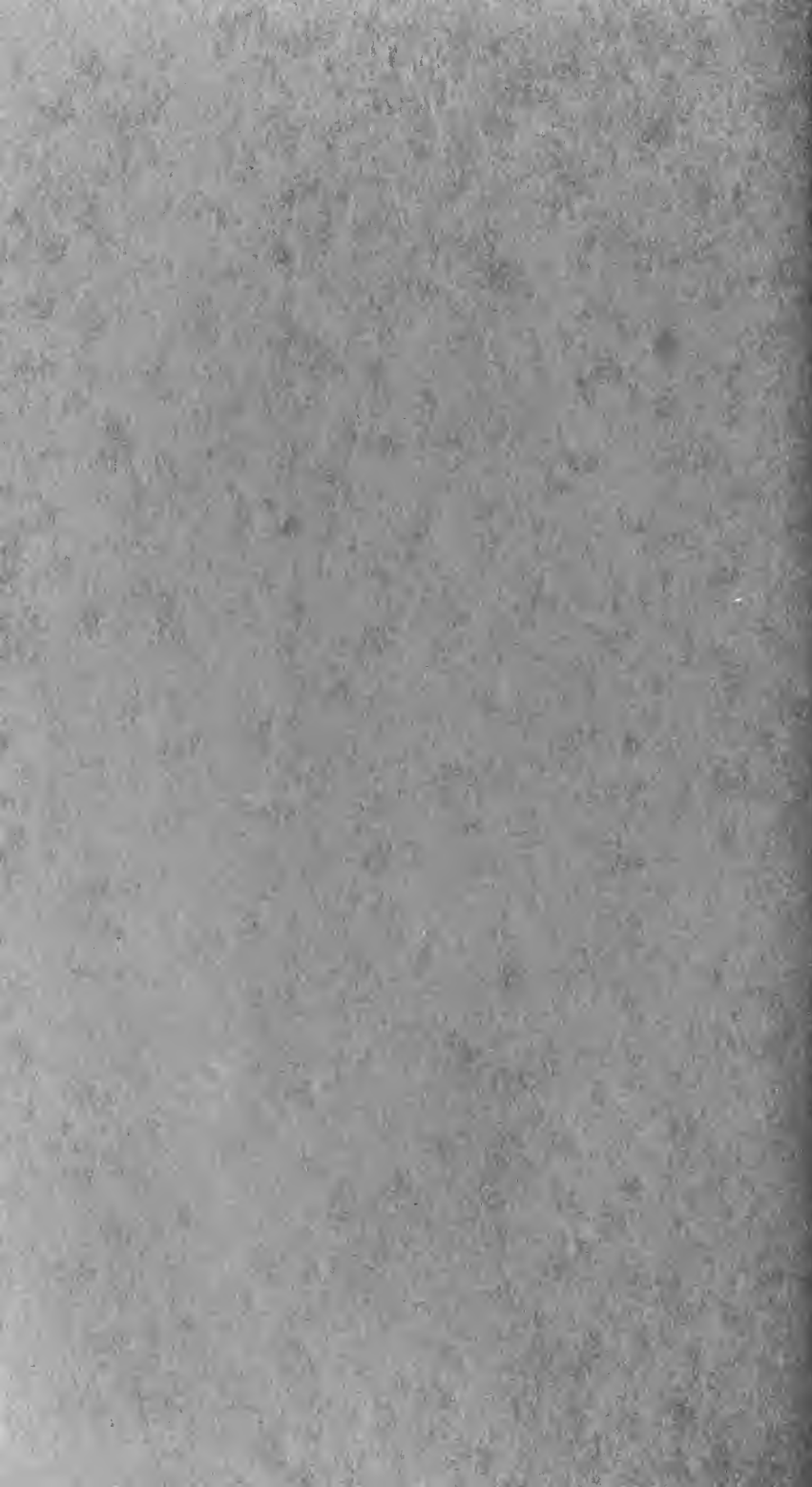
111 West Seventh Street,
Los Angeles 14, California,

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FILED

APR 18 1955

PAUL P. O'BRIEN, CLERK



TOPICAL INDEX

	PAGE
Jurisdictional statement	1
Specifications of error.....	3
Statement of the case.....	4
Argument	8

I.

The District Court reversed without justification findings of fact made by the referee which were supported by substantial evidence and not clearly erroneous.....	8
--	---

II.

The bankrupt corporation here was a distinct entity which could not be disregarded.....	19
---	----

III.

The appellees waived any vendor's lien by conduct inconsistent therewith	20
--	----

IV.

The bankruptcy court at all times had jurisdiction to determine all questions of vendor's liens in this matter.....	26
Conclusions	28

TABLE OF AUTHORITIES CITED

CASES	PAGE
Avery v. Clark, 87 Cal. 619.....	20
Baldwin Rubber Company v. Paine and Williams Co., 99 F. 2d 1	16
Bank of America v. Goldstein, 25 Cal. App. 2d 37.....	21
Brown v. Gillam, 44 Wheat. (U. S.) 290.....	24
Brown v. Kahn, 176 Cal. 159.....	23
Brown v. Volz, 90 Cal. App. 2d 793.....	21
Citizens Trust Co. v. Croll, 289 Fed. 421.....	16
City of Long Beach v. Metcalf, 103 F. 2d 483; cert. den., 60 S. Ct. 139.....	26
Claiborne v. Castel, 98 Cal. 30.....	20
Clover v. Rawlings, 9 Smedes & N. (Miss.) 122.....	24
D. N. & E. Walter & Co. v. Zimmerman, 214 Cal. 418.....	13
Edison Securities v. Ventura Guarantee Bldg. & Loan Assoc., 10 Cal. App. 2d 555.....	23
Estate of Reed v. Reed, 26 Cal. App. 2d 362.....	20
Ferger v. Allen, 35 Cal. App. 738.....	21
Finlayson v. Waller, 64 Idaho 618.....	24
Finnell v. Finnell, 156 Cal. 589.....	20
Forbush v. Bartley, 78 F. 2d 805.....	8
Gardener v. Rutherford, 57 Cal. App. 2d 874.....	13
Hadden-Rodee Co., In re, 135 Fed. 886.....	28
Hirsch v. Morton, 13 F. 2d 701.....	28
Hollywood Cleaning and Pressing Co. v. Hollywood Laundry Service, 217 Cal. 124.....	13
Jones v. Allert, 161 Cal. 234.....	20
Kent v. San Francisco Sav. Union, 130 Cal. 401.....	23
Midtown Construction Contracting Company, Matter of, 243 Fed. 56; cert. den., 245 U. S. 654.....	26
Moths v. United States, 179 F. 2d 824.....	8

Norrins Realty Co. v. Consolidated Abstract Title Co., 80 Cal. App. 2d 879.....	13, 19
Oedekerck v. Muncie Gear Works, Inc., 179 F. 2d 821.....	8
Oriel, In re, 23 F. 2d 409; aff'd, 278 U. S. 358.....	8
Pik Rapid Power Co. v. Minneapolis St. T. & S. S. M. R. Co., 99 F. 2d 902; cert. den., 305 U. S. 660.....	10
Remington v. Higgins, 54 Cal. 620.....	20
Royal Consol. Mining Co. v. Royal Consol. Mines, 157 Cal. 737	20
Selna v. Selna, 125 Cal. 357.....	23
Springfield & M. R. Co. v. Stewart, 51 Ark. 285.....	24
St. Paul Fire and Marine Insurance Co. v. Bachman, 285 U. S. 112.....	11
Sterling, In re, 97 F. 2d 505; cert. den., 305 U. S. 629.....	13
Strong v. Strong, 126 Ill. 301.....	24
Taylor Oak Flooring Co., In re, 87 Fed. Supp. 6.....	8

CYCLOPEDIA

Cyclopedia of Federal Procedure (3d Ed.), Sec. 31.58....	10, 11, 14
--	------------

STATUTES

Civil Code, Sec. 171.....	22
Civil Code, Sec. 171b.....	22
Civil Code, Sec. 3046.....	20
Civil Code, Sec. 3110.....	21
United States Code, Title 11, Sec. 11.....	1
United States Code, Title 11, Sec. 46.....	2
United States Code, Title 11, Sec. 47a.....	2
United States Code, Title 11, Sec. 47b.....	2
United States Code, Title 11, Sec. 48a.....	2
United States Code, Title 11, Sec. 95.....	1
United States Code, Title 28, Sec. 1334.....	1
United States Code Annotated, Title 11, Gen. Orders XLVII, foll. Sec. 53.....	8

No. 14606
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

FRANK M. CHICHESTER, Trustee in Bankruptcy for the
Estate of KENNETH P. SCHMIDT BUILDERS, INC.,
Bankrupt,

Appellant,

vs.

CLARENCE E. POLIKOWSKY, WINNIFRED POLIKOWSKY,
KENNETH P. SCHMIDT and MARY WILKINS SCHMIDT,

Appellees.

OPENING BRIEF OF APPELLANT.

Jurisdictional Statement.

On July 10, 1953, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of California, Central Division [Tr. pp. 3-7], and was immediately referred to the Honorable Reuben G. Hunt, Referee in Bankruptcy. On December 7, 1953, an order was entered adjudging Kenneth P. Schmidt Builders, Inc., a bankrupt [Tr. pp. 8-9]. The District Court thus had bankruptcy jurisdiction under the provisions of 11 U. S. C. 95, 11 U. S. C. 11, and Title 28, U. S. C. 1334.

On October 26, 1953, the Appellees here, through their attorney, Charles M. Fueller, filed their "Petition in Support of Order to Show Cause" [Tr. pp. 9-13]. Appellant, on November 10, 1953, filed his "Answer to Petition for Order to Show Cause" [Tr. pp. 14-17]. Kenneth P. Schmidt and Mary Wilkins Schmidt and the bankrupt, Kenneth P. Schmidt Builders, Inc., filed their individual answers to the order to show cause on November 12, 1953.

The petition of the Appellees sought to impress a vendor's lien on certain real property standing in the name of the bankrupt corporation, located in Pasadena, California [Tr. p. 13]. The answers of Appellant, bankrupt, Kenneth P. Schmidt and Mary Wilkins Schmidt, individually, denied that any such lien existed. There was, therefore, jurisdiction in the United States District Court over the original petition under 11 U. S. C., Section 46.

The Referee denied the petition of the Appellees and held there was no lien in their favor on the subject real property [Tr. pp. 38-45]. Thereupon, the Appellees petitioned for a review of the Referee's order [Tr. pp. 45-48], which was amended [Tr. pp. 49-56].

On review, the District Court reversed the Referee [Tr. pp. 71-74] by an order lodged August 19, 1954, and filed September 30, 1954. Appellant filed his "Notice of Appeal" on October 13, 1954. Jurisdiction is thus in this court by virtue of Title 11, U. S. C., Sections 47a and 47b, and also by 11 U. S. C., Section 48a.

Specifications of Error.

1. The District Court erred in reversing the Referee and finding as a matter of fact that the purchasers of the real property involved were Kenneth Schmidt and his wife, Mary Wilkins Schmidt, and not the bankrupt corporation [Tr. pp. 64, 65 and 68].

2. The District Court erred in reversing the Referee and finding as a matter of fact that there was such inequity in the sale transaction here involved [Tr. p. 68].

3. The District Court erred in concluding as a matter of law that Kenneth P. Schmidt and the bankrupt corporation were one and the same and that the corporate entity must be disregarded in this instance [Tr. pp. 67 and 68].

4. The District Court erred in concluding as a matter of law that the Appellees had not waived any vendor's lien on the subject real property [Tr. pp. 69 and 70].

5. The District Court erred in adjudging that the United States District Court, sitting as a court of bankruptcy, had no jurisdiction to determine the existence of a vendor's lien against real property standing of record in the name of the bankrupt corporation.

Statement of the Case.

The controversy here involves a parcel of undeveloped real property overlooking the Rose Bowl in Pasadena, California. In the summer of 1952 this property stood in the name of Clarence and Winnifred Polikowsky (hereinafter referred to as "the Polikowskys"). They were endeavoring to sell the property and had given an exclusive listing thereof to the Charles MacArthur Company [Tr. p. 154], real estate brokers in Pasadena, California.

In 1952, Kenneth P. Schmidt (hereinafter referred to as "Schmidt") was an individual active in the development and construction of tracts of homes in the Southern California area [Tr. p. 83].

Sometime in the summer of 1952, Schmidt was approached by W. W. Duncan, an individual connected with the MacArthur Company, concerning the purchase of the Polikowsky realty [Tr. pp. 81, 154]. After some dicker-ing back and forth, Schmidt made an offer for the realty, which may be summarized as follows [Tr. pp. 84-87]: Schmidt would give \$21,500 for the property providing that the cost of the development of the tract, streets, lights, and so on, did not exceed \$10,000. The \$21,500 would be payable by a 6% promissory note due in six months secured by deeds of trust on the subdivided lots and the houses erected on them [Tr. pp. 84 and 85]. These trust deeds were to be subordinated to construction loans secured by trust deeds on each house and lot [Tr. p. 85]. As further security, a completion bond on each house was to be given to secure the Polikowskys from the danger of mechanic's liens [Tr. p. 188]. Finally, the Polikowskys were to execute releases of their second trust deeds as each home and lot were sold and would be paid

a pro rata share of the note due them at such time [Tr. p. 85].

Estimates of the cost of development ran higher than the \$10,000 figure originally anticipated and some "horse trading" resulted. The eventual consideration agreed upon was \$20,000 [Tr. p. 110].

From the outset, the Polikowskys and their broker, the MacArthur Company, recognized this as an unusual deal [Tr. p. 84]. Consequently, Schmidt's business reputation was given consideration [Tr. pp. 84 and 88]. Polikowsky, himself a builder [Tr. p. 162], apparently knew of Schmidt and his previous operations and was satisfied as to his integrity [Tr. p. 88].

Shortly before escrow, Schmidt announced, apparently for the first time, to the MacArthur Company, that this deal was to be handled through Kenneth P. Schmidt Builders, Inc. (hereinafter referred to as the "bankrupt") [Tr. pp. 100, 162].

The bankrupt had been formed some years previously for the purpose of development and construction of residence "tracts." At first, Schmidt's father and brothers were interested in the corporation [Tr. p. 143], but by 1952 they had dropped out and Schmidt personally owned at least 80%, and perhaps all the shares of stock of the bankrupt [Tr. p. 144]. He was president and director and fully dominated the corporation. At the time of the subject transaction, the bankrupt was engaged in the construction of a large tract of homes in Monterey Park, California [Tr. pp. 83 and 84]. This operation was apparently to be the source of the funds with which the Polikowskys were to be paid if some hitch developed in the projected subdivision [Tr. p. 196].

The Polikowskys were apprised of the fact that their deal was to be handled through the bankrupt [Tr. p. 162] and inferentially approved the deal, because the purchase plans went forward thereafter.

Although it is not entirely clear just what happened next, apparently sometime in early October, Mr. Charles MacArthur, of the MacArthur Realty Company, went to the escrow department of the Mutual Savings and Loan Association in Pasadena and there dictated escrow instructions for the opening of a sales escrow to dispose of the Polikowsky property [Tr. p. 188]. These instructions were not produced by Appellees, perhaps because they may have been destroyed long before this litigation for reasons which will hereafter become apparent. It may be inferred, however, from the testimony of MacArthur that these instructions followed the general outlines of the sale agreement heretofore sketched [Tr. p. 188].

After the dictation of the first set of escrow instructions by MacArthur, Schmidt called MacArthur and said that the deal could not go forward on the basis originally projected. Because the subdivision of the Polikowskys' plot was not as yet accomplished, it was impossible to obtain completion bonds as originally agreed [Tr. pp. 181 and 182]. At this point, the whole deal was on the point of collapse [Tr. p. 189]. MacArthur then suggested that in lieu of the completion bonds Schmidt go on the promissory note as a co-maker [Tr. p. 189]. Schmidt understood that he was signing as a guarantor [Tr. p. 91].

On this basis, the new escrow instructions of October 30, 1952, which are Appellee's Exhibit 3, were drawn and

executed [Tr. p. 110]. These instructions recite that the property is to be taken in the name of the bankrupt and that the bankrupt will deliver in return its promissory note for \$20,000. These instructions were signed by the Polikowskys, Schmidt individually and Schmidt as president of the bankrupt corporation.

But the transaction was to undergo yet one more change. Schmidt found that the provisions governing the trust deeds to be given to the Polikowskys could not be complied with [Tr. pp. 133, 185 and 188]. He informed the MacArthur Company that the sale could not go forward on the basis set forth in the escrow instructions of October 30, 1952 [Tr. p. 110]. A change was then agreed upon which was reflected in the amended escrow instructions [Tr. p. 113], which are Appellees' Exhibit 4. All references to trust deeds, subordination and release thereof, as well as completion bonds on the street improvements were stricken from the escrow [Tr. p. 113]: in their place, the Polikowskys were to receive a straight unsecured note signed by the corporation, Schmidt and his wife, Mary Wilkins Schmidt [Tr. p. 113]. This is the first time Mrs. Schmidt appeared in the deal.

On the basis of the amended escrow instructions, the sale was accomplished. The Polikowskys received a note signed by the corporation, Schmidt and his wife [Tr. p. 10]. Title to the realty was passed to the bankrupt [Tr. p. 197]. There, matters rested until these proceedings began with a petition by the Polikowskys invoking the aid of the bankruptcy court in attaching to this realty a vendor's lien.

ARGUMENT.

I.

The District Court Reversed Without Justification Findings of Fact Made by the Referee Which Were Supported by Substantial Evidence and Not Clearly Erroneous.

It is elemental that an Appellate Court will not disturb fact determinations of a lower court unless those determinations are clearly erroneous, *Oedekerck v. Muncie Gear Works, Inc.*, 179 F. 2d 821; *Moths v. United States*, 179 F. 2d 824. This rule applies to matters heard by Referees in Bankruptcy and taken on review to the United States District Court, see General Orders XLVII, 11 U. S. C. A. Foll. Sec. 53; *In re Oriel*, 23 F. 2d 409 (Aff'd 278 U. S. 358); *Forbush v. Bartley*, 78 F. 2d 805; *In re Taylor Oak Flooring Co.*, 87 Fed. Supp. 6.

In this case the Referee made certain pivotal fact determinations which Appellant contend were amply supported by the evidence and were not clearly erroneous. On review, the District Judge summarily upset these findings. This, Appellants contend, was reversible error.

A.

The Referee made his Finding of Fact III as follows [Tr. p. 40]:

“On October 30, 1952 an escrow was opened between the Polikowskys, as sellers of the said real property, and the bankrupt as the buyer of the same, at the Mutual Savings and Loan Association of Pasadena * * *.” (Emphasis supplied.)

This Finding is directly contradicted by the Finding of the District Court [Tr. p. 64]:

“3. On October 30, 1952 an escrow was opened between the Polikowskys, as sellers of the real property, and *Kenneth P. Schmidt and Mary Wilkins Schmidt, as the buyers of the same.*” (Emphasis supplied.)

It should be noted immediately that the Finding by the District Court is not supported by the evidence at all. A consideration of Appellees' Exhibit 3 [Tr. p. 110] will show that the only signatories to the original escrow instructions, dated October 30, 1952, are the bankrupt corporation and Kenneth P. Schmidt, and the Polikowskys. How then could Mary Wilkins Schmidt, on October 30, 1952, be considered one of the buyers? Obviously, the Finding of the District Court on this point has no basis in fact whatsoever.

It is not until December 12, 1952 when the amended escrow instructions were signed, that Mary Wilkins Schmidt's name first appears in the transaction [Tr. pp. 113, 114]. Even taking the Appellees own Exhibits 3 and 4 on their very face the District Court finding cannot be supported.

However, there is another, more serious vice in this reversal by the District Court. The two escrow instructions [Exs. 3 and 4; Tr. pp. 110, 113 and 114] are unclear in themselves. Exhibit 3 is signed by the bankrupt and Schmidt, personally. Exhibit 4, however, is a most peculiar document as to execution. Inspection will show that the bankrupt corporation signed by Clarence E. Polikowsky and Winnifred Polikowsky. Since there has never been any contention or evidence that these two

individuals were in any way connected with this corporation it must be concluded that they signed in error. If so, what is the significance of the signatures by Schmidt and his wife, who appears for the very first time at this point? Were they signing individually? If so, what of the bankrupt corporation? Was it not consenting to the change? How could the contract, which is Exhibit 3 [Tr. p. 110], be so vitally altered without the consent of one of the parties thereto? These and other ambiguities render the true arrangement between the parties clouded.

In this state of the facts, the Referee admitted parole evidence to show what the true arrangement was and who the real parties thereto were. Of this ruling no complaint has been made on appeal. Thus, a question of fact was posed for the Referee: Who was the true purchaser of the realty involved? (See Cyc. of Fed. Proc. (3rd Ed.) Sec. 31.58, and *Pik Rapid Power Co. v. Minneapolis St. T. & S. S. M. R. Co.*, 99 F. 2d 902 (Cert. den. 305 U. S. 660).)

The evidence quite clearly showed that the purchaser was to be the corporation. Schmidt so testified [Tr. p. 89]. The escrow fees were paid by corporate check [Tr. p. 102]. Title was to be taken in the name of the corporation [see Ex. 3; Tr. pp. 110, 197]. Schmidt and his wife were on the deal merely to guarantee payment of the note [Tr. pp. 91 and 189].

In the foregoing state of the evidence, the Referee resolved the conflicts between the ambiguous escrow instructions and the oral evidence by declaring that the corporation was the purchaser. Such was the proper Finding of Fact in view of the conflicting evidence. (Cyc.

of Fed. Proc. (3rd Ed.) Sec. 31.53; *St. Paul Fire and Marine Insurance Co. v. Bachman*, 285 U. S. 112.)

When the District Court reversed this Finding of the Referee, it transformed the entire complexion of the litigation. If Schmidt and his wife are the buyers, then, as well hereafter be seen, they occupy a position which would alter the legal effect of their individual signatures on the unsecured promissory note given in payment for the real property. If, however, the bankrupt corporation is the purchaser, then the Schmidts *vis a vis* the Polikowskys occupy quite another position.

In summary then, the Finding of the Referee that the purchaser of the real property was the corporation was a proper supported Finding of Fact, the reversal of which by the District Court was not only legally incorrect, but highly prejudicial to the Appellant here.

Closely related to the error committed in reversing of the finding of the fact of the Referee as to *who was* the purchaser of the real property, is that of the District Court as to the manner in which the escrows were handled.

The Referee found as follows [Tr. p. 41]:

“After October 20, 1953, it appearing that the transaction could not be completed upon the basis above mentioned, *the Polikowskys and the bankrupt corporation amended on December 5, 1952, the said escrow instructions * * *.*” (Emphasis supplied.)

In direct contradiction to the Referee's Finding of Fact, the District Judge has found as follows [Tr. p. 65]:

“That thereafter, it appearing that the transaction could not be completed on the basis above mentioned, *the Polikowskys and Kenneth P. Schmidt and Mary*

*Wilkins Schmidt amended the purchase agreement on December 5, 1952. * * *.*” (Emphasis supplied.)

The Referee had before him at the time of the trial Appellees’ Exhibits 3 and 4, the escrow instructions of October 30 and December 5, 1952, respectively [Tr. pp. 110, 113 and 114]. The bankrupt corporation signed Exhibit 3 as the buyer: Although its name was typed on Exhibit 4, the Appellees signed in a representative capacity for the bankrupt corporation—obviously an error. It was also apparent that all parties had acted as if the amended escrow instructions were fully binding on the corporation as well as on the other parties: the note was given as agreed therein, no security was demanded nor given, and titled vested in the bankrupt. To settle and clarify this matter oral testimony was admitted by the Referee and whatever conflict there was between it and Appellees’ Exhibit 4 was resolved in favor of the oral testimony by the Referee’s Finding IV heretofore quoted [Tr. p. 41].

What is the significance of the reversal by the District Court on this point? If the escrow instructions are amended by the Schmidts and the Polikowskys only as the District Court found, then this is a further indication that they are the “purchasers.” The effect of that on the disposition of this case has been heretofore argued. If, on the other hand, the fact is as the Referee found it to be—that the amendment is between the bankrupt corporation and the Polikowskys—then this is consonant with its designation as the purchaser. The signature of Schmidt and his wife on the note then becomes what Schmidt testified it to be: a guarantee of payment for the benefit

of the Polikowskys [Tr. p. 91] and, as will hereafter appear, the Polikowskys would then have legally waived their vendor's lien.

B.

From the outset of this litigation, Appellees have strenuously urged that the corporate entity of the bankrupt should be disregarded as to them and Kenneth P. Schmidt, individually, set up in its place. Reading the transcript in its entirety will indicate that a substantial portion of the evidence introduced by the Appellees sought to establish the elements which the law recognizes as necessary if an "*alter ego*" situation is to be established.

The question of whether or not the *legal* conclusion to disregard the corporate entity made by the District Court was proper will be deferred to a subsequent portion of this brief. Here, Appellant only proposes to examine the reversal of certain Findings of Fact in connection therewith.

It seems clearly established in the California law that mere ownership of all, or a controlling interest in the stock of a corporation will not of itself permit the corporate entity to be disregarded, *Norrins Realty Co. v. Consolidated Abstract Title Co.*, 80 Cal. App. 2d 879. What is required is something in addition—that to recognize the corporate entity will promote or permit fraud, injustice or inequity, see *D. N. & E. Walter & Co. v. Zimmerman*, 214 Cal. 418; *In re Sterling*, 97 F. 2d 505 (Cert. den. 305 U. S. 629); *Hollywood Cleaning and Pressing Co. v. Hollywood Laundry Service*, 217 Cal. 124; *Gardener v. Rutherford*, 57 Cal. App. 2d 874.

Recognizing these basic rules of law, the Referee made a clear Finding of Fact on this point [Tr. p. 42]:

“At none of the time hereinmentioned was the bankrupt corporation used or intended to be used by the said Kenneth P. Schmidt as his *alter ego* or as a device to perpetrate any fraud, injustice or equity.”

That this was a proper Finding of Fact is indicated both by law and reason. The question of whether or not a fraud has been perpetrated has been declared by the Federal Courts to be one of fact. (See Cyc. of Fed. Proc. (3d Ed.) Sec. 31.53 and the many cases there cited.) If fraud is a question of fact, the same reasons would dictate that inequity and injustice be similarly classified. After all, these are relative matters, varying from case to case and, in Appellant's view, perfect examples of conclusions of ultimate fact to be drawn from all the evidentiary matters presented.

The Referee's Finding of Fact heretofore referred to was amply supported by the evidence. Nowhere has there appeared even the slightest hint that the reason Schmidt made this a corporate transaction was to work any fraud or injustice on the Polikowskys. He did all of his building operations through this corporate form, and at the very time of the negotiations was engaged in the construction of a large tract in the corporation name in Monterey Park, California [Tr. p. 196]. Because of complications in that venture, this unfortunate bankruptcy proceeding resulted. Furthermore, as an added protection to the Polikowskys, he personally went on the note as an accommodation maker. These are not the facts which indicate a misuse of the corporate form to work some sort of fraud or inequity. There is no indication any-

where in the record that Schmidt at any time attempted to hide behind the corporation shield so as to protect himself from personal liability.

In the face of the record and the Finding of Fact made by the Referee, the District Court saw fit to strike off in the opposite direction. Firstly, nothing denominated as a Finding of Fact on this essential element was made. The closest that the District Court came to this was Finding VIII [Tr. p. 67]:

“That at all times herein mentioned the bankrupt corporation was under the control and domination of Kenneth P. Schmidt; that Schmidt was the sole stockholder; that he requested the title to said real property herein mentioned to be placed in the name of the corporation for his personal convenience; that at all times herein mentioned the employees of the Board of Directors were employees of Kenneth P. Schmidt and were appointed by him as members of the Board of Directors of said bankrupt corporation and at all times held their membership at his sufferance and subject to his dismissal at any time; that at all times mentioned herein the officers of said bankrupt corporation were employees of Kenneth P. Schmidt who held their offices at his sufferance and were subject to dismissal from their office at any time; that said Kenneth P. Schmidt commingled his funds and his real property with the funds and real property of the corporation; that the books and records of the corporation were loosely kept; that at no time prior to the filing of the bankruptcy proceedings did the real property appear upon the books of the corporation; that at the time of the transfer and prior thereto said Kenneth P. Schmidt represented the petitioners, Clarence E. and Winnifred Polikowsky, that he and the corporation were one and the same and that he was the sole owner and stockholder therein.”

It will be noted that here we have no determination at all on the question of whether or not there was any fraud, inequity or injustice—the only basis for disregarding the corporate entity under the California law cited above. Instead we have a mish-mash of evidentiary facts adding up to nothing more than that the corporation was controlled and owned by Schmidt individually, which is no more than was set forth more lucidly by the Referee in his Finding of Fact No. I [Tr. p. 39].

When we turn to the Conclusions of Law made by the District Court we discover, however, the Finding of Fact, there masquerading as a determination of law [Tr. p. 68]:

“That in this particular case *equity requires that the separate entity of the bankrupt corporation and its individual owners be disregarded* and that it be deemed for the purpose of this transaction that the transfer of said real property to said bankrupt corporation was actually a transfer of said real property to Kenneth P. Schmidt and Mary Wilkins Schmidt.” (Emphasis supplied.)

While the form may be questionable, Appellant realizes that the misplacing of a Finding of Fact among the Conclusions of Law is not fatal, and where, as here, such a Finding is essential, the Conclusion of Law may be construed as a Finding of Fact to fill the gap. (*Baldwin Rubber Company v. Paine and Williams Co.*, 99 F. 2d 1; *Citizens Trust Co. v. Croll*, 289 F. 421.) The vice is not in the form, but in the substitution of the Appellate Court’s determination for that of the trial court as to a question of fact.

The court here will perceive the importance of this reversal of fact if it but survey the position of the Appel-

lees. They came to the bankruptcy court to have affixed to real property standing in the name of the bankrupt corporation a vendor's lien. Almost as soon as trial began the Appellees were confronted with an embarrassing fact which has plagued them all through this litigation: Although the title stood in the name of the corporation and the promissory note given therefor was executed by the corporation, that note was also signed by Schmidt and his wife individually. They stubbornly insist (to their own personal detriment it must always be remembered) that they were asked to sign as mere guarantors. One way the Appellees sought to meet this problem was to contend that the bankrupt and Schmidt were one and the same—that the separate corporate existence should be disregarded. At least this would relieve them of the embarrassment of one signature. When the Referee, then, found no fraud, inequity or injustice he frustrated this defense and placed Appellees once more in an uncomfortable position as to Schmidt's individual signature, a position which legally, as Appellant will show hereafter, is fatal to Appellee's assertion of a vendor's lien. When the District Court summarily reversed the Finding of Fact of the Referee it removed at least one obstacle to the preferred position which the Appellees seek.

Appellant also wishes to urge upon this court that in actuality there is no evidence whatsoever to support the finding of any inequity in this instance. Mr. Polikowsky was not innocent in the construction business: he apparently was an experienced builder in the Los Angeles area [Ex. 1, Tr. p. 83; Ex. 5, Tr. pp. 159 and 162]. The fact that this was a corporate deal with title to be taken in the corporate name was known to the Polikowskys during the negotiations and before the first escrow instruc-

tions were signed [Tr. p. 81; Appellees' Ex. 5, Tr. p. 162]. An inspection of the latter letter, Appellees' Exhibit 5, is most instructive in this connection. It provides in part [Tr. p. 162]:

“There would be no other major changes from the proposal contained in our letter of October 5th. Additional *minor items* would include:

- (a) *The property would be acquired in the name of Kenneth P. Schmidt Builders, Inc. Mr. Schmidt is the president and sole owner of all the stock. He has stated that he would be willing to personally sign the note in addition to the signature of the corporation.*” (Emphasis supplied.)

It will be noted that in the opinion of the agent of the Polikowskys this is a “minor item.” But further, consider the significance of the statement that “He has stated that he would be willing to personally sign the note in addition to the signature of the corporation.” It can only be inferred from this that the Polikowskys' agent, MacArthur, knew and, thus, his principals the Polikowskys knew, that the corporate entity was distinct, that it alone might not be enough to protect the Polikowskys on the note, and so the additional safeguard of Schmidt's individual signature was desirable. Is this the conduct of uninformed innocence being victimized by a fraudulent, unjust or inequitable use of the corporate form? Appellant thinks not. The Polikowskys understood from the beginning that the corporation stood between them and Schmidt and that only by obtaining his individual signature could they be sure of reaching his individual assets and integrity.

To conclude, then, the Referee made a proper, vital Finding of Fact on the question of fraud, inequity and

injustice. It was amply supported by the evidence and was No clearly erroneous. The District Court in complete disregard of the settled rules of Appellate law improperly reversed that Finding and made one which is contrary to at least the weight, if not all the evidence in the case.

II.

The Bankrupt Corporation Here Was a Distinct Entity Which Could Not Be Disregarded.

The Referee concluded as follows [Tr. p. 43]:

“The bankrupt corporation is not the *alter ego* of Kenneth P. Schmidt individually, and is a separate entity distinct from Kenneth P. Schmidt, even though he owned or controlled practically all of the capital stock of the corporation and controlled and dominated its affairs.”

The conclusion of the District Court [Tr. p. 68] is the opposite: namely, that the corporation was the *alter ego* of Schmidt.

As has been noted before, there is no vice under the California law in one man owning all the stock and dominating and controlling a corporation (*Norrins Realty Co. v. Consolidated Abstract Title Co.* (Op. Cit.).) Something else is required: that recognition of the corporate entity will promote fraud, injustice or inequity. Thus, the conclusion of whether or not there is an *alter ego* corporation in this case must turn entirely upon the facts.

Appellant has argued at length all the facts heretofore which indicate the justification for the Referee's Finding that there was no fraud, inequity or injustice in this instance. In the absence thereof it was error for the District Court to conclude that the bankrupt corporation and Schmidt were one and the same.

III.

The Appellees Waived Any Vendor's Lien by Conduct Inconsistent Therewith.

The District Court concluded as a matter of law that the Appellees had not waived a vendor's lien on the instant real property [Tr. p. 69]. It is the contention of the Appellant that such was error, that the correct legal conclusion from the facts, as they should have been found by the District Court (and were found by the Referee) was that a vendor's lien, if any ever did exist, was waived by the conduct of the Appellees.

A.

California Civil Code, Section 3046 provides for a vendor's lien in the following language:

“One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.”

The California law is most clear that the vendor's lien can be waived by act and conduct inconsistent therewith, *Estate of Reed v. Reed*, 26 Cal. App. 2d 362. Such conduct may be shown by parole evidence, *Claiborne v. Castel*, 98 Cal. 30. Once waived, the vendor's lien is gone forever, *Finnell v. Finnell*, 156 Cal. 589; *Royal Consol. Mining Co. v. Royal Consol. Mines*, 157 Cal. 737.

It is clear that taking any additional security is a waiver of the vendor's lien, see *Avery v. Clark*, 87 Cal. 619; *Remington v. Higgins*, 54 Cal. 620; *Jones v. Allert*, 161 Cal. 234. While there is no California case directly in point, *Jones v. Allert* (Op. Cit.) declares that where the promissory note of a third party is taken this is such a

security as constitutes a waiver of a vendor's lien. This principle should extend to a situation where third parties signed on a promissory note given for the purchase price as accommodation makers or guarantors. Their signatures are on the instrument as security to the vendee for payment—and this is inconsistent with the vendor's lien which is predicated upon equitable principles of looking only to the land for security, *Ferger v. Allen*, 35 Cal. App. 738.

When these rules are applied to the facts of this case, they spell out a waiver of vendor's lien by the Appellees. The promissory note which the Appellees hold is admittedly signed not only by the corporation but also by Schmidt and his wife individually. Since they signed as makers, but without receiving personal value therefor and, as all the evidence clearly shows, for the purpose of lending their names to the bankrupt, they were accommodation makers, Cal. Civ. Code, Sec. 3110; *Bank of America v. Goldstein*, 25 Cal. App. 2d 37, 42; *Brown v. Volz*, 90 Cal. App. 2d 793.

Schmidt and his wife came to sign the note in different ways. Although there is some indication in Appellees' Exhibit 5 [Tr. p. 162] that Schmidt's individual signature was contemplated as a protection to the Polikowskys when Schmidt requested that the deal be handled through the bankrupt corporation, later testimony by MacArthur, Appellees' own witness, is to the effect that Schmidt's signature was to prevent the entire purchase falling through, and was given in lieu of completion bonds and trust deeds which were originally designed to protect the Polikowskys [Tr. p. 189]. Whichever evidence is correct, clearly Schmidt came on the note as additional security for the Polikowskys and he always so understood [Tr. p. 91].

The role of Mrs. Schmidt is not so clear. She is never mentioned in the negotiations and never appears until the amended escrow instructions of December 5, 1952, which are Appellees' Exhibit 4 [Tr. p. 113]. Her appearance then is most significant, however. By then the elaborate security structure outlined in the escrow instructions of October 30, 1952 [Tr. p. 110] had become impossible [Tr. p. 133] and there was substituted therefor the note executed by the bankrupt, Schmidt and his wife. Since, by the escrow instructions of October 30, 1952 Schmidt was already pledged to sign individually, all that was added by the subsequent instructions was the signature of Mary Wilkins Schmidt in lieu of the security provisions which had previously been outline. This had the effect of pledging her individual property as security for the payment of the note, see Cal. Civ. Code. Sec. 171 and 171b.

The conclusion, must be that at the close of the sale the Appellees accepted additional security in the form of the individual signatures of Schmidt and his wife. By so doing, the Appellees took security and waived their vendor's lien.

B.

The Referee determined that the Polikowskys waived their vendor's lien under the California law when they executed the escrow instructions of October 30, 1952 [Tr. p. 110]. In part those instructions provide:

“* * * showing title vested in Kenneth P. Schmidt Builders, Inc., a corporation, *free of encumbrances* except: all general and special taxes for the fiscal year 1952, 1953, including personal property taxes of any former owner, and also including any special district levies, payment of which is included therein and collected therewith; all taxes and assessments levied

or assessed subsequent to date of these instructions; conditions, restrictions, reservations, covenant, rights, rights of way, easements and the exception of water on or under said land, now of record, if any; * * *” (Emphasis supplied.)

The case of *Edison Securities v. Ventura Guarantee Bldg. & Loan Assoc.*, 10 Cal. App. 2d 555 is squarely in point here. At page 557 and 558 of 10 Cal. App. 2d the court says:

“The covenant that respondent’s title to said land should be free and clear of all encumbrances excludes the idea that a title subject to a lien in favor of appellant was to be retained. (*Royal Consol. Min. Co. v. Royal Consol. Mines Co.*, 157 Cal. 737, 748)”.

The Referee personally examined the clerk’s transcript in that case. He found that it contained [Tr. p. 30] an agreement similar to the one involved in the escrow in this case.

Since this court is bound by the substantive law of the State of California, Appellant urges that the *Edison Securities Company* case is determinative here and precludes any vendor’s lien in favor of the Appellees. The rule of the *Edison Securities* case will indicate that they had waived their rights to any such lien.

C.

The waiver of a vendor’s lien rests on the theory that the vendee does or says something which is inconsistent with his assertion of that lien, *Selna v. Selna*, 125 Cal. 357; *Kent v. San Francisco Sav. Union*, 130 Cal. 401; *Brown v. Kahn*, 176 Cal. 159.

The problem, so far as the Appellant has been able to determine, has not been squarely presented in Cali-

fornia, but in several other jurisdictions as early as the year 1807, a rule has been recognized that where the vendor knows that the purpose of conveying free and clear title to the vendee is to permit the vendee to encumber the land, then this constitutes a waiver of the vendee's rights, see *Brown v. Gillam*, 44 Wheat. (U. S.) 290; *Strong v. Strong*, 126 Ill. 301; *Springfield & M. R. Co. v. Stewart*, 51 Ark. 285; *Clover v. Rawlings*, 9 Smedes & N. (Miss.) 122. The most recent expression of this rule is to be found in the case of *Finlayson v. Waller*, 64 Idaho 618, where the court said:

“It appears the conveyance of the apartment house property from appellant to the Wallers was made for the purpose of enabling them to mortgage the property so they might acquire funds to pay appellant the compensation as agreed in the contract. Such facts are inconsistent with any intentions to retain a vendor's lien, and therefore a waiver thereof. (27 R. C. L. p. 575, Sec. 318.)”

Appellant feels that on principle a similar rule should be adopted in this case. The Polikowskys could have insisted (in the customary fashion) on a trust deed on the real property to secure the purchase price. To obtain more for their land they did not do so. Instead, they entered into an arrangement which from the outset they and their agent, an experienced real estate broker, knew to be unusual and precarious [Tr. p. 84]. Instead of first trust deeds, they were to receive a completion bond and second trust deeds, which were to be subordinated to first trust deeds. The Polikowskys knew that the first

trust deeds would have to be attached to the property so that construction and development thereof might go forward and the Appellees eventually paid their higher consideration.

One by one these securities had to be relinquished, until the only manner in which the deal could go forward was to abandon all security which might appear of record, permit free and clear title to be given to the bankrupt and take back a note signed by the bankrupt, Schmidt and his wife [Tr. p. 189].

Now, once a vendor's lien is gone, it is gone forever. Appellant insists that where the Polikowskys voluntarily removed their last hold on the property they waived any vendor's lien. What could be more unfair and inconsistent than to permit the title to pass deliberately free and clear on the record, knowing that the bankrupt proposed to encumber it to build and to pay off the Polikowskys, and yet secretly insist that the property is the security for the notes that the Appellees hold?

In final summary, then, the District Court erred when it did not conclude that the vendor's lien was waived by accepting the signatures of Schmidt and his wife on the note, by entering into an escrow which promised free and clear title and finally by deliberately permitting title to pass unencumbered to the bankrupt, knowing full well that the purpose of such unencumbered title was to permit other loans to be placed on the property so that houses might be built and the Appellees paid.

IV.

The Bankruptcy Court at All Times Had Jurisdiction to Determine All Questions of Vendor's Liens in This Matter.

A point of considerable confusion to the Appellant has been the judgment of the District Court which held that the Bankruptcy Court was without jurisdiction in this matter [Tr. p. 74].

On argument, the District Judge announced that he did not believe that the Bankruptcy Court had jurisdiction in the matter and thereupon refused to permit either counsel for Appellant or Appellee here to argue any other point. It is presumed that the judgment was made in pursuance of that view.

Appellant cannot conceive of a case where the Bankruptcy Court more clearly had jurisdiction than in this instance. On at least two separate and distinct bases the Bankruptcy Court had jurisdiction in this matter.

Generally speaking, Bankruptcy Courts are courts of limited jurisdiction, which is to say that they have summary jurisdiction only. They have summary jurisdiction as to all property, both real and personal in the actual or constructive possession of the Bankruptcy Court, *Matter of Midtown Construction Contracting Company*, 243 Fed. 56 (Cert. den. 245 U. S. 654). Where title stands in the name of the bankrupt to real property, the Bankruptcy Court has summary jurisdiction to adjudicate all questions of title thereto, *City of Long Beach v. Metcalf*, 103 F. 2d 483 (Cert. den. 60 S. Ct. 139).

There never has been the slightest question that title to the real property here stands in the name of the bankrupt. The Appellees petition alleges it, the escrow instructions so recite [Tr. p. 110] and the deed ran from the Polikowskys to the bankrupt. In the face of this evidence, how can it possibly be said that the Bankruptcy Court was without summary jurisdiction in this case? It had the property in its constructive possession and under the clear statutory and case law in bankruptcy had full jurisdiction to determine all right thereto, including asserted liens of every nature.

An even stronger case can be made out for jurisdiction in the Bankruptcy Court on the basis of the manner in which the proceedings arose here. These are not the usual efforts of a bankruptcy trustee to quiet title to property standing in the name of the bankrupt. These proceedings were initiated by the Appellees themselves [Tr. p. 9] who sought [Tr. pp. 12 and 13]:

“* * * request the above-entitled court that an order to show cause be issued direct to said Kenneth P. Schmidt, Mary Wilkins Schmidt and Kenneth P. Schmidt Builders, Inc., and to Frank M. Chichester, Trustee in Bankruptcy for said Kenneth P. Schmidt Builders, Inc., directing them to show cause if any they have, why said vendor's lien should not be impressed upon said real property and why the above-entitled court should not declare that they, the said Kenneth P. Schmidt, Mary Wilkins Schmidt and Kenneth P. Schmidt Builders, Inc., have no right, title nor interest therein or why said Clarence E. Polikowsky and Winnifred Polikowsky should

not be permitted to bring an action in the courts of the State of California to impose said vendor's lien."

Now it is settled law that where a claimant or one asserting a lien voluntarily submits the question of his rights for determination to the Bankruptcy Court jurisdiction is conferred by that consent, *Hirsch v. Morton*, 13 F. 2d 701; *In re Hadden-Rodee Co.*, 135 Fed. 886.

In this case *all parties named in the order to show cause appeared* and a full trial was had on the issues. The question of jurisdiction was never mentioned nor raised by anyone. Then, for the first time the problem was raised by the District Court itself.

It can be seen from the foregoing that since the litigation here was over property in the constructive possession of the bankruptcy court, between parties *all* of whom consented to a determination of their rights by the bankruptcy court, the District Court erred in finding it was without jurisdiction in this matter.

Conclusions.

Appellant insists that there must be a reversal in this case for the following reasons:

1. Because the District Court reversed Findings of Fact made by the trial court and which were supported by the evidence and not clearly erroneous.

2. Because the District Court incorrectly concluded as a matter of law that the bankrupt corporate entity should be disregarded and considered one and the same as Kenneth P. Schmidt, individually.

3. Because the District Court incorrectly concluded that there was not a waiver of the vendor's lien in this case.

4. Because the District Court incorrectly adjudged and decreed that the Bankruptcy Court was without jurisdiction in this matter to determine the rights of the respective parties in and to the real property here involved.

Respectfully submitted,

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No. 14606.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK M. CHICHESTER, Trustee in Bankruptcy for the
Estate of KENNETH P. SCHMIDT BUILDERS, INC., Bank-
rupt,

Appellant,

vs.

CLARENCE E. POLIKOWSKY, WINNIFRED POLIKOWSKY,
KENNETH P. SCHMIDT and MARY WILKINS SCHMIDT,

Appellees.

REPLY BRIEF OF APPELLEES, CLARENCE E.
AND WINNIFRED POLIKOWSKY.

FILED

MAY 14 1955

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PAUL P. O'BRIEN, CLERK



TOPICAL INDEX

	PAGE
Statement of the case.....	1
Argument	4
I.	
Résumé of principal proceedings.....	5
II.	
Appellees Polikowsky at all times since the transfer of the subject property to the vestee corporation had and retained a vendor's lien.....	7
A. Appellees Polikowsky did not waive their vendor's lien by the acceptance of security other than the personal obligation of the buyers.....	8
B. Appellees Polikowsky did not waive their vendor's lien by agreeing to give a title in such manner that the public records would disclose no lien nor incumbrance	10
C. Appellees Polikowsky are not estopped from asserting their vendor's lien by reason of having done or said something inconsistent with the assertion of their lien..	16
III.	
The District Court was justified in overruling the erroneous inferences drawn by the the referee from the uncontroverted and undisputed facts.....	18
IV.	
The findings of the District Court that the bankrupt Schmidt Corporation was but the alter ego of Schmidt and his wife, and should not be treated as a separate entity, was the only inference which should be drawn from the facts.....	20
A. The requirements which must be present before the corporate veil may be pierced.....	20

	PAGE
B. The Schmidt Corporation was but the alter ego of its owners, the Schmidts.....	21
C. The cases in California concerning piercing the corporate veil are quite voluminous, and we feel an obligation to the court to give excerpts of the cases which we consider illustrative of the rules.....	23

IV.

Jurisdiction of the Bankruptcy Court to determine all questions of vendor's liens in this matter.....	32
---	----

V.

Miscellaneous	33
Conclusion	34

TABLE OF AUTHORITIES CITED

CASES	PAGE
Brown v. Kahn, 176 Cal. 159.....	17
Clark v. Millsap, 197 Cal. 765.....	27
D. N. & E. Walter & Co. v. Zuckerman, 214 Cal. 418.....	29
Edison Securities v. Ventura Guarantee Building and Loan Association, 10 Cal. App. 2d 555.....	10, 11
Finnell v. Finnell, 156 Cal. 589.....	14
Gordon v. Aztec Brewing Co., 33 Cal. 2d 514.....	24
Groether v. Meyer Rosenberg, Inc., 11 Cal. App. 2d 268.....	30
Hedgeside Distillery Corp., In re, 123 Fed. Supp. 933.....	18
Kelly, In re, 85 Fed. Supp. 316.....	19
Kohn v. Kohn, 95 Cal. App. 2d 708, 214 P. 2d 71.....	31
Maltby v. Conklin, 50 Cal. App. 201.....	16, 33
Mirabito v. San Francisco Dairy Co., 8 Cal. App. 2d 54.....	31
Reid's Estate, In re, 26 Cal. App. 2d 362.....	12
Royal Consol. Min. Co. v. Royal Consolidated Mines Co., 157 Cal. 737	12
Schwartz v. Mead, 116 Cal. App. 606.....	11
Selna v. Selna, 125 Cal. 357.....	8
Seymour v. Slide and Spur, 153 U. S. 509, 38 L. Ed. 802.....	8, 14
Smith v. Schultz, 23 Idaho 144, 129 Pac. 640.....	10
Taylor v. Newton, 117 A. C. A. 938, 257 P. 2d 68.....	32
Weisstein Bros. and Survol v. Laugharn, 84 F. 2d 419.....	18
Wenban Estate, Inc. v. Hewlett, 193 Cal. 675.....	24
Wilson v. Wilson, 76 Cal. App. 2d 119.....	9
Wood v. Gunther, 89 Cal. App. 2d 718.....	9

STATUTES

Civil Code, Sec. 1114.....	12
Civil Code, Sec. 3046.....	7

TEXTBOOKS

12 California Jurisprudence 2d, p. 606.....	23
17 California Jurisprudence, p. 718.....	11

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Estate of KENNETH P. SCHMIDT BUILDERS, INC., Bank-
rupt,

Appellant,

vs.

CLARENCE E. POLIKOWSKY, WINNIFRED POLIKOWSKY,
KENNETH P. SCHMIDT and MARY WILKINS SCHMIDT,

Appellees.

REPLY BRIEF OF APPELLEES, CLARENCE E. AND WINNIFRED POLIKOWSKY.

Statement of the Case.

The appellant has made in his opening brief, a statement of the case. This statement goes into much detail concerning the preliminary negotiations between the parties, which were finally merged into an entirely different agreement, and although the statements are, in our opinion, substantially correct, much immaterial matter is contained. There is also an innuendo in appellants statement to the effect that appellees Polikowsky were guilty

of destroying records of the escrow company, with which innuendo we cannot agree.

With this explanation, and this exception, we adopt the Statement of the appellant so far as it goes, but make the following additions thereto:

After preliminary negotiations, the Polikowskys, appellees, agreed to transfer to the Schmidt corporation, their real property, and in consideration therefor were to receive an unsecured note executed by the Schmidt corporation, and each of the Schmidts individually. The agreement altering the previous tentative agreements between the parties, consisted of amended escrow instructions dated December 5, 1952. [Pet. Ex. 4; Tr. pp. 113-114.] These instructions were signed by each of the Schmidts, but peculiarly enough, although a place was provided on the instructions for the signature of the corporation, it was not executed on behalf of the corporation. [Tr. p. 114.]

Pursuant to the terms of those last instructions the property was conveyed to the corporation, and the appellees received their note. No payments were or have been received on account of the note. The note by its terms became due six months after December 5, 1952. In July, 1953, an involuntary petition in bankruptcy was filed against the corporation, and in October, the appellees Polikowsky brought their petition asserting their vendor's lien.

Appellant points out in his statement that:

Schmidt owned 80% and perhaps all of the stock of the corporation. [Tr. p. 93.]

He was president and director, and fully dominated the corporation. [Tr. p. 100.]

To those facts should be added:

During 1952 and 1953 all members of the Board of Directors of the corporation were there as Schmidt's sufferance; they were subject to removal by him at any time. [Tr. p. 100.]

Schmidt expended funds of the corporation on his own home, and subsequently transferred it to the corporation. [Tr. p. 100.]

The real property, subject of appellees petition, was never encumbered, nor used as an asset of the corporation, nor even set up on its books. Title was never transferred by the corporation. [Tr. pp. 135-136.]

It was not even included as an asset in the sworn bankruptcy schedules. [Tr. p. 137.]

ARGUMENT.

In reply to the Opening Brief of Appellant, we make our argument under the respective subheadings as follows:

I. Résumé of the principal proceedings had and taken in the matter of said Petition for order to show cause.

II. Appellees Polikowsky at all times since the transfer of title to the vestee corporation of the subject property, had and retained a vendor's lien thereon which was not waived:

A. By the acceptance of security other than the personal obligation of the buyers.

B. By agreeing to give a title to the effect that the public records would disclose no encumbrances.

C. By acting in such a manner as to be estopped from asserting their vendor's lien.

III. The District Court was justified in over-ruling the erroneous inferences drawn by the Referee from the undisputed and uncontroverted facts.

IV. The finding of the District Court that the bankrupt was but the *alter ego* of Schmidt and his wife, and should not be treated as a separate entity was the only inference which should be drawn from the facts.

V. The question of the Jurisdiction of the Bankruptcy to enforce the vendor's lien of appellees Polikowsky.

VI. Miscellaneous.

A. Appellants were not guilty of destroying records of the escrow company.

I.

Résumé of Principal Proceedings.

This case was initiated by the filing in the United States District Court, in the matter of Kenneth P. Schmidt Builders, Inc., alleged bankrupt, of the said petition praying for an order to show cause to be issued directed to said Kenneth P. Schmidt, Mary Wilkins Schmidt, Kenneth P. Schmidt Builders, Inc., and Frank C. Chichester, Trustee in Bankruptcy for said corporation, ordering them to show cause, if any they had, why the vendor's lien described in the petition should not be impressed upon the real property likewise described, or why the court should not declare that said persons and corporation had no interest in said real property, or why petitioners should not be permitted to bring suit in the courts of the State of California to impress their vendor's lien.

Answers were made thereto by said Frank Chichester, as Trustee, by the corporation, and Kenneth P. Schmidt and Mary Wilkins Schmidt, individually, and thereby issues were joined.

The case was tried before Honorable Reuben G. Hunt, Referee in Bankruptcy, the Transcript of the hearing commencing on page 79 of the Transcript of the Record. An index of the Transcript appearing on pages I, II and III of the Transcript indicates the location of the record of the proceedings, trial procedure, and all other pertinent matters contained in the Transcript.

Thereupon the said Referee in Bankruptcy filed herein Findings of Fact, Conclusions of Law, and Order on Petition in Reclamation of Clarence E. and Winnifred Polikowsky, thus designating and referring to the said petition on order to show cause hereinbefore mentioned.

By this order [Tr. p. 44] the Referee ordered that the petition of the appellees Polikowsky be disallowed, and determined that the property in said petition described was the property of the bankrupt corporation, free and clear of any claim of the petitioners.

Thereupon the said petitioners filed in said District Court their Petition for Review of Order of Referee.

The Petition (Amended) came on for hearing before Honorable Harry C. Westover, Judge of said Court, and basing his findings and decision upon the same uncontroverted and undisputed evidence as was before the Referee, the court made and filed its Findings of Fact, Conclusions of Law, and Order on said Petition on review, and Judgment thereon.

By this judgment, the said judge of said District Court held in effect [Tr. pp. 63-74] that Schmidt and his wife were the purchasers; that the corporation was not to be regarded as a separate entity under the circumstances of this case, and that the bankrupt corporation had no interest in the real property. He further held that the bankruptcy had no jurisdiction to impress a Vendor's Lien upon the property of Schmidt and his wife who were not bankrupt.

From this judgment of the Judge of the District Court, this appeal has been taken.

II.

Appellees Polikowsky at All Times Since the Transfer of the Subject Property to the Vestee Corporation Had and Retained a Vendor's Lien.

The theory that a vendor who had not received the purchase price of his real property was entitled to a lien thereon, was at an early date adopted by the equity courts without the necessity of legislative sanction, the equitable principle involved being deemed sufficient.

The legislature of the State of California saw fit to make this principle a part of our written law, in 1872, and the Section, so far as we can determine, has undergone no change since that time. The Civil Code, Section 3046, though simple, is extremely comprehensive, and reads as follows:

“One who sells real property has a vendor's lien thereon independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.”

The courts of the State of California, and the Supreme Court of the United States have commented upon the nature and effect of the vendor's lien with approval, calling attention to the equitable principle upon which it is based:

“The rule of our Civil Code was intended to make more clear and definite the equity rule as to vendor's liens. The principle upon which this lien has been established by courts of equity is that a person who has gotten the estate of another ought not, in conscience as between them, to be allowed to keep it and not pay the full consideration money. The true origin of the doctrine may with high probability be ascribed to the Roman Law from which it was im-

ported into the equity jurisprudence . . . ‘There can be no doubt that the existence of such a lien is among the settled doctrines of the English chancery . . . Its foundation exists in the general principles of equity and moral justice, by which the seller is entitled to hold upon the estate until he gets the price.’ The lien of the vendor is of so high a nature that it is not extinguished by his death, but passes to his representatives. Nor is it discharged by death of the grantee, but may be endorsed against his estate, or those into whose hands the property may come.”

Selna v. Selna, 125 Cal. 357.

“It is a doctrine of equitable jurisprudence which says that land, which is immovable, is the best security for its own price, and that title thereto should therefore pass subject to the equitable burden of such security.”

Seymour v. Slide and Spur Mines, 153 U. S. 509,
38 L. Ed. 802.

A. Appellees Polikowsky Did Not Waive Their Vendor's Lien by the Acceptance of Security Other Than the Personal Obligation of the Buyers.

While the rule is different in some states, it is clearly the law in California that the acceptance of security other than the unsecured obligation of the purchasers is a waiver of the vendor's lien. Hence, the acceptance of the guarantee of a third person is deemed to waive the lien.

The facts in the instant case are that the only consideration given for the vendor's real property, was a promissory note signed by Schmidt, his wife, and the Schmidt corporation. Those same signatures are to be found on the agreement of exchange, by the terms of

which the property was agreed to be placed in the name of the Schmidt corporation.

The only contention which could be made that vendor received any security other than the personal obligation of the purchasers would be upon the basis that Schmidt, his wife, or the corporation, all signatory thereto, were third party accommodation makers or guarantors.

The District Court held that this corporation was not to be regarded as a separate entity in this transaction, which finding was amply justified, as we shall later argue.

The signature of Schmidt's wife on the promissory note was not that of an accommodation maker but was the signature of one of the purchasers. Not only was she a party signatory to the escrow agreement, but her community interest in the acquisition was such that her signature is not considered that of a third party accommodation maker.

Property acquired by either party to the marriage, during the marriage relationship is presumptively community property.

Wilson v. Wilson, 76 Cal. App. 2d 119;

Wood v. Gunther, 89 Cal. App. 2d 718.

Where a wife co-signed a note with her husband, which was given in consideration for the transfer of real property to him, the Supreme Court of Idaho held as follows:

"If, however, as suggested on the other hand, this property became community property between the husband and wife, then the wife's signature to the note would not constitute security within the contemplation of the statute, but would merely be evidence of the community indebtedness or the signature of

one of the purchasers, in which event it would not constitute security within the purview of the statute.”

Smith v. Schultz, 23 Idaho 144, 129 Pac. 640.

We think it logical and equitable that where a wife has an equal share in the community property of the marriage, she should not be heard to contend that her signature on the promissory note given in the acquisition of such property is that of a third party guarantor, and not that of an interested party.

B. Appellees Polikowsky Did Not Waive Their Vendor's Lien by Agreeing to Give a Title in Such Manner That the Public Records Would Disclose No Lien nor Incumbrance.

Appellants argue with great force, that the case of *Edison Securities v. Ventura Guarantee Building and Loan Association*, 10 Cal. App. 2d 555, holds that where a vendor agrees to provide instruments entitling the escrow holder to procure a Standard Owners policy of title insurance showing title vested in a vestee free of encumbrances, such agreement waives the lien.

We feel that there are several cogent reasons why this case is not controlling under the facts of the case presently before the court.

In the first place, the provisions of the Standard Owner's title insurance were not before that court, and the exceptions set forth in such policy of title insurance were not a part of the record. The policy of title insurance which was procured pursuant to the agreement of the petitioners, appellees herein, is before this Court. [Pet. Ex. 6, pp. 167 to 179.] This policy of title insurance specifically excepts all liens and encumbrances not shown

on the public records. A vendor's lien is, by its very essence, not a matter of public record, for if it were, it would lose its character as an implied lien, but would then become an express lien. If the courts were to read into the law, a waiver of the vendor's lien arising from an agreement to convey a title showing no record of encumbrance, such would be judicial legislation, and in clear derogation of the statute.

The *Edison Securities* case (*supra*) is interesting for another reason. The decision in that case holds that inasmuch as the vendor received investment certificates of the vendee, most of which were paid when due, the acceptance of the investment certificates was the acceptance of a security, within the meaning of the statute. The learned judge gives, as an additional and we believe unnecessary reason, that an agreement to furnish a title free of encumbrances waives the vendor's lien, *as the lien was an encumbrance*. Both before and after the ruling in the *Edison Securities* case, *supra*, the law in California has been as follows:

“A vendor's lien is not an absolute charge upon the land but a mere personal privilege to resort to if desired as a means of enforcing the contract.”

Schwartz v. Mead, 116 Cal. App. 606;

17 Cal. Jur. 718.

The learned Justice who wrote the opinion in *Edison Securities* case (*supra*) was Jamieson, Justice *Pro Tem*. His opinion was concurred in by Pullen, Presiding Judge, and Justice Thompson. Three years later, in an opinion delivered by Justice Thompson, and concurred in only by Pullen, P. M. (there being no dissent) the same division

of the District Court of Appeal quoted with approval the following language:

“A vendor’s implied lien after conveyance is created by the law and not by contract of the parties as are mortgages. It is not a specific absolute charge on the land, but a mere equitable right to resort to it upon failure of payment by the vendee, that is, it is in its nature a personal privilege, unassignable, which the vendor can assert only in a suit brought for the purpose of having it decreed and forced.”

In re Reid’s Estate, 26 Cal. App. 2d 362.

We gather from the foregoing language, that the nature of a vendor’s lien is such that it is not truly a lien nor encumbrance at the time of conveyance, and cannot be asserted until the vendee has defaulted in his obligation. If our interpretation be correct, a vendor’s lien is not an incumbrance upon real property within the meaning of Section 1114, Civil Code, until default in vendee’s obligation to pay the purchase price.

Appellant also cites the case of *Royal Consol. Min. Co. v. Royal Consolidated Mines Co.*, 157 Cal. 737, as authority for the proposition that a covenant to give clear title excludes the intention to retain a vendor’s lien. This case, by reason of its facts is not in point in that the substantial rights of third persons were so affected as to estop vendor from asserting his lien. In the words of the court:

“In other words, the agreement contemplated that a title apparently free and unencumbered, should be conveyed to a corporation which should, upon the basis of such title, issue and sell its shares in an amount exceeding a million dollars.”

The court continued, distinguishing its holding from an earlier case decided by the United States Supreme Court in the following language:

“It is true that in *Slide and Spur Gold Mines v. Seymour*, 153 U. S. 509, 38 L. Ed. 802, it was held that a somewhat similar covenant was to be construed as referring ‘to prior charges and incombrances’ and not to ‘any which arise out of the conveyance itself.’ But in that case there was but a single transfer directly from the vendor to a corporation organized by the vendee to take title. Here the property was to be conveyed to Van Ee, and by him to a corporation. Even if we give to the covenant for a transfer free and clear of encumbrances the restricted meaning applied in the *Slide and Spur* case, the vendor’s lien claimed must have attached at the moment of the transfer to Van Ee. It would, therefore, have been prior to the conveyance by Van Ee to the British corporation, and was excluded by the provision that that transfer should be free of incumbrances.”

We feel that the particular question in this case as to whether a vendor’s agreement to give a title free or clear of incumbrances, or to convey such a title that the public records will not disclose incumbrances (the latter being the situation in the case before this court) is completely answered by the Supreme Court of the United States in the following language:

“An intent to abandon it (referring to a vendor’s lien) is not to be presumed, and while of course, like any other right it may be abandoned or waived, the evidence of an intent so to abandon or waive should be clear and satisfactory.

“It is not questioned in this case that a large part of the money consideration for the sale of these mines

still remains unpaid, and the defendant is in the attitude of one who, admitting that the vendors have not received the money for which they sold the land, nevertheless insists upon retaining the property discharged of any obligation for its payments . . . But the provision that the property should be free from all charges and encumbrances obviously refers to prior charges and encumbrances, and does not exclude any which arise out of the conveyance itself. It means simply that the grantors shall have removed all burdens which rested upon the property prior to the time of making their deed and that the deed shall pass the title perfect and unencumbered, but not that the grantee shall take it free from all obligations of payment or discharged from the lien for the purchase price which rests upon real estate until such price is paid."

Seymour v. Slide and Spur, 153 U. S. 509, 38 L. Ed. 802.

The only inequity which would result from the assertion of the vendor's lien in the present case would be the disappointment on the part of the Schmidts occasioned by their failure to acquire the property of appellees without payment. The disappointment caused by this blow to their expectations is not such as to cause any court serious concern.

The comments of the Supreme Court of the State of California in the case of *Finnell v. Finnell*, 156 Cal. 589, indicates clearly the California rule in connection with appellant's contention:

"Unless plaintiff waived his rights in that behalf, he acquired at the time of this sale to his father a vendor's lien on the property so conveyed by him, for so much of the price as remained unpaid and

unsecured otherwise than by the personal obligation of the buyer, which lien was valid against everyone claiming under the buyer except a purchaser or incumbrancer in good faith and for value. Civil Code 3046 and 3048. Whatever may be said against the policy of allowing such a secret lien, not evidenced by any writing or public record, our Legislature has seen fit to look with favor upon it, and to continue in force the old equity rules in regard thereto . . . Our law, recognizing this as a just principle, gives to every vendor, in the vendor's lien declared by Section 3046, security for, and a means of enforcing payment of the consideration, so far as it can do so without injury to the rights of bona fide purchaser or incumbrancers for value . . . But the lien is presumed to exist, and is an incident of the transaction of sale, in all cases unless the intention of the Vendor that it shall not exist be clearly manifested by his acts or declaration, and the burden of proof is on the Vendees or his successors to show such intention . . .

“It is claimed that the evidence shows that the plaintiff knew that his father intended to mortgage the land to James H. Goodman & Co. Bank in order to take up plaintiff's notes to him . . . Plaintiff had no actual knowledge of his father's intention to mortgage this land, but it is claimed that the knowledge of his agents was imputed to him . . . We do not consider this claim well based under the circumstances . . . The matter of obtaining the necessary funds wherewith to make the purchase from plaintiff was a transaction solely between the purchaser and the bank, with which plaintiff had nothing whatever to do . . .”

C. Appellees Polikowsky Are Not Estopped From Asserting Their Vendor's Lien by Reason of Having Done or Said Something Inconsistent With the Assertion of Their Lien.

The vendor's lien is a creature of equity, and it is most appropriate that the equitable doctrine of estoppel be imposed, where necessary to prevent the improper assertion of a vendor's lien.

It is urged that the conveyance by the vendor with knowledge that the vendee intended to mortgage the property for the purpose of procuring funds with which to pay the vendor would be such an act. Appellants make the distinction between an intention to mortgage the property for the *purpose of obtaining funds for purchase thereof*, and for other purposes, for the reason that the California courts have already held that a vendor could follow the equity remaining, over and above the amount of the mortgage, and assert his lien thereof even though he conveyed for the purpose of enabling vendee to encumber. (See *Maltby v. Conklin*, 50 Cal. App. 201.) So they endeavor to draw the finer distinction which is not specifically covered in our cases, that a difference occurs where the purpose of the mortgage is shown to have been for the purpose of paying the purchase price.

Now in the first place, there was no testimony that the purpose of the incumbrance was to obtain funds with which to pay the vendee. Counsel made an offer of proof concerning testimony to that effect. The Referee at first denied the offer of proof, but subsequently reopened the case to permit the testimony to be given. But even after reopening the case for that purpose, the testimony did not indicate that such was the purpose of the contemplated incumbrances. Nor was it logical that it would have been.

The note was due within six months after the signing of escrow instruction. [Tr. p. 20.] The property had to be made ready for subdivision, with engineering, and approval of the Real Estate Commission. Streets and utilities were required to be provided. [R. p. 85.] It is not probable that the purchasers conceived that all of this could be done, and homes erected and sold within six months. MacArthur testified that the funds were to come from a subdivision which Schmidt was completing in Monterey Park. [R. p. 157.] Schmidt merely testified that he had arranged for loans to build houses. [R. p. 135.] Nevertheless, the appellants insist that the purpose of the contemplated encumbrance was to pay vendor.

Assuming arguendo, that such was the purpose, the situation does not change. No encumbrance was ever put on the property and no rights of innocent third parties have intervened. The California rule which has been announced in connection with this doctrine of estoppel is as follows:

“The true doctrine as outlined by these authorities in this state, and as fully sustained by the great weight of authority in other states, would seem to be, that in order to constitute a waiver of a vendor’s lien there must be some act or omission on the part of the vendor inconsistent with his assertion of the lien, and evincing his intention to waive it, and that it must be such an act or omission as would render it *inequitable to thereafter assert it.*” (Emphasis added.)

Brown v. Kahn, 176 Cal. 159.

III.

The District Court Was Justified in Overruling the Erroneous Inferences Drawn by the Referee From the Uncontroverted and Undisputed Facts.

At the outset we should mention that the facts of this case are not in dispute. The Referee so stated, in the following language. "The facts do not appear to be in dispute." [Tr. p. 23.] The District Court so held. [Tr. p. 72.] Appellants have not set forth any controverted testimony. Our recollection of the proceedings, and our careful reading of the Transcript discloses no dispute as to any of the facts.

This Honorable Court has previously held, in a circumstance in which there is no dispute as to the facts, but only questions of law are presented, that the inferences drawn by the Referee are in no manner binding upon review.

Weisstein Bros. and Survol v. Laugharn, 84 F. 2d 419.

The most recent expressions of this same rule which we have been able to find are as follows:

"This Court is inclined to agree with the Trustee and the Bank that there are no substantial issues of fact presented to it for determination. That being the case, the only questions presented here are those of law. In such a situation, it is a familiar doctrine that a reviewing court must exercise its independent judgment. The presumption of correctness of the Referee's finding is not extended by General order XLVII see 11 USCA following section 53, to his conclusions of law."

In re Hedgeside Distillery Corp., 123 Fed. Supp. 933 (942).

In speaking of a Referee in Bankruptcy,

“When his conclusions are based upon an inference from undisputed facts or upon an interpretation of an instrument, it is not binding on review.”

In re Kelly, 85 Fed. Supp. 316.

If we understand appellants position clearly, it is his contention that several of the findings of the District Judge are not supported by the evidence, but that the findings of the Referee are supported. We do not feel it desirable to belabor the issues by first pointing out the erroneous conclusions of the Referee and then supporting the findings of the District Court by excerpts from the testimony. But we will nevertheless endeavor not to dodge issues raised by appellant.

Appellant argues at some length that as Mary Wilkins Schmidt was not signatory to the first escrow instruction of October 30, 1952, the escrow was not *opened* by her. As the finding is not particularly material, the escrow instructions of that date having been completely amended, we feel extended discussion is unnecessary, but would only point out that by signing the amendment, she adopted the unchanged portions of the original instructions.

Appellant point out that the finding of the District Court as to the parties to the amended instructions was incorrect in that he did not find the corporation a party to the amendment of December 5, 1952. The escrow instructions of December 5, 1952, were signed by the Schmidts and not by the corporation. The District Court had as good an opportunity to examine the instructions [Pltf. Ex. 4] as did the Referee. Where an instrument concerning the covenant to real property is not signed by a party, it seems obviously correct to conclude that the parties *signatory only* were bound, thereby.

IV.

The Findings of the District Court That the Bankrupt Schmidt Corporation Was but the Alter Ego of Schmidt and His Wife, and Should Not Be Treated as a Separate Entity, Was the Only Inference Which Should Be Drawn From the Facts.

The doctrine of piercing the corporate veil is one which has received the careful consideration of our court on many occasions. We propose to treat this subject by first pointing out what we understand to be the accepted requirements, by next pointing wherein the instant case falls within all such requirements, and lastly by quoting from numerous California cases illustrative of the rule.

A. The Requirements Which Must Be Present Before the Corporate Veil May Be Pierced Are as Follows.

1. The capital stock of the corporate *alter ego* must have a unity of ownership and the owners thereof act in unity or in concert in relation to the corporation and its affairs.

2. There must be such a unity of interest and ownership between the corporation and its owners that the individuality of such corporation and such persons has ceased.

3. If the separate identity of the corporation is maintained distinct from that of the stockholders an injustice or inequitable result will be done some third party. It is not necessary that actual fraud be shown, but it is sufficient that an inequitable result would follow.

B. The Schmidt Corporation Was but the Alter Ego of Its Owners, the Schmidts.

The Schmidt corporation was owned and dominated by Schmidt. Even the Referee so found. [Tr. pp. 83-84.] At all times herein mentioned the directors of the corporation were appointed by Schmidt and at all times held their membership at his sufferance and subject to his dismissal. Schmidt commingled his funds and his real property with those of the corporation. He represented to the appellees Polikowsky that he and the corporation were one and the same. [Finding VIII, Tr. pp. 67, 164-165.]

Schmidt's attitude toward the corporation is illustrated by his testimony, which we will quote, and by two peculiar circumstances which make it evident that he considered the corporation but a conduit through which he did business.

Comment has been made before that the corporation did not sign the effective escrow instructions by virtue of which appellees transferred the property. This fact seems to us a clear indication that the corporation was considered as a mere formality, but had no true existence as such, and on this occasion it did not seem to serve any particular purpose even to observe the form.

A second, and as revealing an indication is found in the fact that Mary Schmidt signed the promissory note in favor of the appellees, as *Secretary* of the corporation, as well as individually.

Schmidt testified and reiterated and it was not contradicted, in referring to his wife: "She was never secretary." [Tr. pp. 94-95.]

The signing of the promissory note as *secretary* of the corporation, although she was never the secretary, only

serves to further illustrate the point that the Schmidts did not consider nor look upon the corporation as a separate entity, but as a mere fiction, and in this case, even the pretense of proper formality was dispensed with.

Schmidt's testimony before the Referee is equally illustrative of his attitude that the corporate entity was merely a method of his doing business. Excerpts from his testimony are as follows:

"I would like to take title in the corporation."
[R. p. 81.]

"*We* wanted to build these particular houses in that corporation." [R. p. 81.]

"The business was all in the corporation. That was the only building project *I* had going and the only corporation." [R. p. 101.]

"*My* records (referring to the corporation records) were never up to date." [R. p. 101.]

"I would like to have title delivered to Kenneth P. Schmidt Builders, Inc. . . . It would be better for *us* to develop their property under the building company . . . and for the purpose of borrowing money. . . ." [R. p. 133.]

"I told them that the Mutual Savings and Loan where we had the escrow opened had given *me* a verbal commitment to finance the homes and *I* would borrow. . . ." [R. p. 135.]

"All I did was spend several thousand dollars engineering the map." [R. p. 136.]

There is little doubt after reading the testimony of Schmidt himself that he considered that he was doing business under the corporate name, and that in his own mind the corporate entity was merely a fiction.

In Schmidt's own words the Polikowskys felt that they were doing business with him through his dummy corporation. "Well I think they actually believed they were doing business with myself as an individual." [Tr. p. 82.]

Neither the Referee nor the appellants were able to see any particular inequity in the loss by appellees of their real property without payment therefor. They impliedly admit that many of the requirements toward piercing the corporate veil are here present, but insist that there is no fraud, injustice nor inequity here present which necessitates that the separateness of the corporation and its owners be ignored. It seems to us self-evident that where the recognition of a dummy corporation would deprive another of his property without payment therefor, an inequity or unjust result would obtain. And if it merely be necessary to ignore the separateness of the dummy corporation in order to prevent a palpable injustice, the courts have never hesitated to brush aside the corporate veil.

C. The Cases in California Concerning Piercing the Corporate Veil Are Quite Voluminous, and We Feel an Obligation to the Court to Give Excerpts of the Cases Which We Consider Illustrative of the Rules.

"The fusion of corporate entity with that of the principal stockholder *need not be forged out of the existence of actual fraud*; it is sufficient if inequitable results to third persons will flow from a non-recognition of the identity of corporate and individual existence." (Emphasis added.)

12 Cal. Jur. 2d 606.

“Separate entity will be disregarded, *though actual fraud need not be shown*, and it is sufficient if a refusal to recognize the *alter ego* relationship will bring about inequitable results.” (Emphasis added.)

Gordon v. Aztec Brewing Co., 33 Cal. 2d 514.

In the case of *Wenban Estate, Inc. v. Hewlett* (1924), 193 Cal. 675, the rule which the claimants in the present matter would urge is stated in the following language:

“When necessary to redress fraud, protect the rights of third persons, or to prevent a palpable injustice, the law and equity will intervene and cast aside the legal fiction of independent corporate existence, as distinguished from those who hold and own the corporate capital stock, and deal with the corporation and stockholders as identical entities with identical duties and obligations.

“That the identity of Caroline S. Wenban and the corporation are the same cannot, under the practically admitted facts of the case, be doubted or disputed. She was at all times following the formation of the corporation the sole owner of all of the shares of the stock of the corporation. Caroline S. Wenban at all times controlled and directed the affairs of the corporation as if she and the corporation were one. She herself testified in effect that all of the corporate stock of the corporation belonged to her and that she practically controlled the corporation in all of its action and that the directors of the corporation, who were members of her family, did whatever she wanted them to do with regard to the corporation, and this testimony stands undisputed. The corporation was organized for the sole purpose of owning and operating Caroline S. Wenban’s property. It was created merely as a convenience for the management of her property. There was a complete

unity of interest and ownership in the assets of the corporation between Caroline S. Wenban and the corporation. In other words, the corporation was her *alter ego*. That the corporation was looked upon as the *alter ego* of Caroline S. Wenban is evidenced by the acquiescence of the other directors of the corporation in her conduct whereby she treated the bonds of the corporation as her own. In such a situation her responsibility as the sole shareholder of the corporation, when dealing with the assets of the corporation, was the corporation's responsibility, and conversely the obligation of the corporation in this particular situation is her obligation."

Further to bring into relief the situation we are considering, we quote again from the case:

"Accordingly, it has been held that upon a sufficient showing a corporation is but the instrumentality through which an individual, who is the sole owner of all of the corporate capital stock, for convenience transacts his business, equity, looking to the substance rather than the form of the relation, and the law as well, will hold such corporation obligated for the acts of the sole owner of the corporation to the same extent and just as he would be bound in the absence of the existence of the corporation. (*Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210 (155 Pac. 986); *Commercial Security Co. v. Modesto Drug Co.*, 43 Cal. App. 162 (184 Pac. 964); *Minifie Rowley*, 187 Cal. 481 (202 Pac. 673).) Thus proof that an individual owns all of the stock of a corporation and that the corporation is in truth and in fact but the corporate double of the owner of the stock, will, in conjunction with a further showing that as a result of the double relationship fraud or injustice will inure to a third person, suffice to dissipate the separate identity of the corporation. (*Mini-*

fie v. Rowley, supra.) In such a situation, where, as here the rights of third persons are involved, the law will have no compunction in holding the contract of the owner of the corporation dealing with the corporate assets, to be the contract of the corporation. *Porter v. Lassen County Land Co.*, 127 Cal. 261 (59 Pac. 563); *Schuyler v. Pantages*, 54 Cal. App. 83 (201 Pac. 137); *Swartz v. Burr*, 43 Cal. App. 442 (185 Pac. 411).

“It is at once apparent, in the instant case, that an adherence to the fiction of independent corporate existence would permit Caroline S. Wenban, despite the fact that she herself ignored the corporate fiction and treated the bonds in suit as her own, to seek shelter behind a corporate existence, which was no more nor less than her individual self, and thereby escape all liability for obligations to third persons incurred by her in her dealings with the assets of the corporation. In short, an adherence to the fiction of independent corporate existence, under the circumstances of the instant case, would permit Caroline S. Wenban to secure an advantage over third persons, through the medium of the corporation, to which she would not be entitled as an individual and which it would be inequitable to permit her to obtain and retain.

“True there is no showing or claim of fraud in the instant case on the part of Caroline S. Wenban or the corporation plaintiff. Still, as previously indicated, it is not necessary that actual fraud be shown. It is sufficient if a refusal to recognize the fact of the identity of the corporate existence with that of the individual would bring about inequitable results. All of the facts and circumstances surrounding the inception of and attending the controversy in suit bring the case clearly within the two require-

ments declared in *Minifie v. Rowley*, *supra*, to be sufficient to constitute the cause of action stated in the cross-complaints of the several appellants.”

The case of *Clark v. Millsap* (1926), 197 Cal. 765 is another example of the rule where the corporate entity may be disregarded in order to promote justice.

“It is a well recognized rule of law that a corporation may be considered a legal entity when used for the accomplishment of a legal purpose. Corporations, however, cannot be used as a cover under which wrongs may be committed and fraud perpetrated. In such a case the court will look through the form of the corporation to ascertain its actual purpose and intent. If the purpose and intent of the corporation are bad, its corporate entity will be no cover for wrong, fraud, and bad faith. (*MacFadden v. Jenkins*, 40 N. D. 422 (169 N. W. 151).) Upon the dissolution of a corporation the directors become the trustees for the creditors and they may be sued in any court in the state. (Sec. 400, Civ. Code.) This does not mean, however, that a person who has at all times exercised absolute control over a corporation and used it wrongfully as a medium to enrich himself will not be held personally responsible for this misfeasance. And it may not be necessary under some circumstances to make the corporation which was used as an entity merely to consummate a wrong, a party to the action. The facts of a case may be such as to require a court of equity, which always has inherent power in such cases, to treat the corporation and the individuals owning all of its stock as identical. Thus corporate entity, existing as such entirely distinct from its members, may be ignored in order to circumvent the fraudulent purposes of the stockholders in its organization. (*Ayer*

& *Lord Tie Co. v. Commonwealth*, 208 Ky. 606 (271 S. W. 693).) In order to redress wrongs committed by fraud and protect third persons' rights or to prevent a palpable injustice, equity will interfere and cast aside the legal fiction of a corporate existence and deal with the corporation and stockholders as identical entities with identical duties and obligations. 'Where an individual is the owner of all the corporate capital stock and uses the corporation merely as an instrumentality through which he transacts business the separate entities will be disregarded when necessary to prevent fraud and to protect the rights of third persons.' (*Minifie v. Rowley*, 187 Cal. 481, 487 (202 Pac. 673); *Wenban Estate, Inc. v. Hewlett*, 193 Cal. 675, 696 (227 Pac. 723, 731).) In the last cited case this court said that when such a situation exists, 'equity, looking to the substance rather than the form of the relation, and the law as well, will hold such corporation obligated for the acts of the sole owner of the corporation to the same extent and just as he would be bound in the absence of the existence of the corporation.' While many of the cases cited relate to a situation where but one individual uses the corporate name in the manner suggested, the principle is the same when two or more own the stock and act in conjunction in the name of the corporation. (*McCormick-Saeltzer Co. v. Grizzly Creek Lumber Co.* (Cal. App.) 240 Pac. 32); *Zenos v. Britten-Cook Land & Livestock Co., et al.*, (Cal. App.), (242 Pac. 914); 6 Cal. Jur. 591.) 'Corporate entity is ignored in order that fraud or some kindred wrong may be defeated.' (*Erkenbrecher v. Grant*, 187 Cal. 7 (200 Pac. 641); *Relley v. Campbell*, 134 Cal. 175 (66 Pac. 220); *Rutz v. Obear*, 15 Cal. App. 435 (115 Pac. 67); *Deming v. Maas*, 18 Cal. App. 330 (123 Pac. 204); *Minifie v. Rowley*, *supra*.) The

doctrine of corporate entity is not so sacred that a court of equity will hesitate to look through form to the substance of the thing and it may in proper cases ignore it to preserve the rights of persons imposed upon or circumvented by fraud. In such cases corporate fiction is disregarded.”

The case of *D. N. & E. Walter & Co. v. Zuckerman* (1931), 214 Cal. 418, is a typical case for the application of the doctrine of corporate *alter ego*. For many years one Joe Goldberg was engaged in business under the fictitious name of Home Builders Supply Co. The defendant, Zuckerman, had guaranteed to plaintiff that said Joe Goldberg, doing business under said name, would pay for goods supplied him. Thereafter Goldberg organized a corporation under the name of Home Builders Supply Company. All of the capital stock, except qualifying shares, was issued to Goldberg, and he continued at all times to hold all of the capital stock. The merchandise, on account of which the balance of the purchase price is now sued for, was furnished after the incorporation of the corporation. Before the incorporation payment checks were issued to the plaintiff and signed “Home Builders Supply Co. by Joe Goldberg.” After the incorporation the checks were signed “Home Builders Supply Co., a corporation, by Joe Goldberg, President.” Goldberg became involved financially, and the plaintiff sued Zuckerman as guarantor of the account. Findings and judgment went for the defendant on the theory that the incorporation and Goldberg’s transaction of business under the name of the corporation so changed the relationship of Zucker-

man as to release him as guarantor. This judgment was reversed, the Supreme Court holding in that behalf as follows:

“We think the trial court was in error in its conclusion on the undisputed facts. The corporation was distinctly a one-man corporation. It was Goldberg’s *alter ego*, completely owned, dominated and controlled by him. This was also true as to the business formerly conducted by him under the same name. To all intents and purposes Goldberg at all times involved herein contained to transact business under the name of ‘Home Builders Supply Co.’ The separateness of the person and the corporation would of course be recognized if no equitable results would follow. But where, as here, an inequitable result would follow the two should be considered as one, and the doctrine of *Minifie v. Rowley*, 187 Cal. 481 (202 Pac. 673) and *Wenban Estates, Inc. v. Hewlett*, 193 Cal. 675 (227 Pac. 723), would apply.”

In the case of *Groether v. Meyer Rosenberg, Inc.* (1936), 11 Cal. App. 2d 268, 271, the court disposes of the corporate identity in the following words:

“If the foregoing allegations are true, then Meyer Rosenberg, Inc., is doubtless liable for the debts of Meyer Rosenberg individually, for it is well settled that inasmuch as the separate personality or capacity of a corporation is but a statutory privilege, it must not be utilized for fraudulent purposes, such as a cloak or disguise for the evasion of contracts or other obligations; and that where it appears that it is being used merely as an instrumentality through which an individual who is the owner of its capital stock transacts his business, both law and equity will hold the corporation liable for the obli-

gations of its owner. (6 Cal. Jur. 597, 598; 6a Cal. Jur. 75; *Stanford Hotel Co. v. M. Schwind Co.*, 180 Cal. 348 (181 Pac. 780); *Meizlisch v. San Francisco Wool Co.*, 213 Cal. 668 (3 Pac. 2d 310).)”

In the case of *Mirabito v. San Francisco Dairy Co.* (1935), 8 Cal. App. 2d 54, at page 59 it is said:

“Separate corporate identity, however, is not always available as a defense. Where there is such a unity of interest and ownership that the separateness of the corporations has ceased and the facts are such that an adherence to the fiction of a separate existence of the corporation would under the particular circumstances sanction a fraud or promote an injustice, separate identity will be disregarded. (*Minifie v. Rowley*, 187 Cal. 481, 487 (202 Pac. 673).) Thus it has been held that where a corporation was but the instrumentality through which an individual for convenience transacted his business, all of the authorities, not only equity but the law itself, would hold such a corporation bound as the owner of the corporation might be bound, or conversely, hold the owner bound by acts which bound his corporation. (*Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 214 (155 Pac. 986); *Industrial Research Corp. v. General Motors Corp.*, 29 Fed. 2d 623, 625.)”

The law of this State is that the separate corporate entity will not be honored where to do so would be to defeat the rights and equities of third persons.

Kohn v. Kohn, 95 Cal. App. 2d 708, 214 P. 2d 71.

“The issue is not so much where, for all purposes, the corporation is the “*alter-ego*” of its stockholders or officers nor whether the very purpose of the organization of the corporation was to defraud the individual who is now in court complaining, as it is an issue of whether in the particular case presented and for the purposes of such case justice and equity can best be accomplished and fraud and unfairness defeated by a disregard of the distinct entity of the corporate form.”

Taylor v. Newton, 117 A. C. A. 938, 257 Paç. 2d 68.

IV.

Jurisdiction of the Bankruptcy Court to Determine All Questions of Vendor's Liens in This Matter.

Our learned opponents who have appeared many times before this honorable Court, are considered as experts in the field of bankruptcy. We do not pretend to be familiar in all of the niceties of bankruptcy practice, and in connection with the ruling of the District Court that he had no jurisdiction over the Schmidts personally in this case, we can only comment that our research led us to believe that he did have jurisdiction to make a final decision concerning the vendor's lien. This we felt to be particularly true, inasmuch as the Schmidts saw fit to have the property placed in the name of their dummy corporation, the bankrupt herein, and inasmuch as they personally appeared and vigorously contested appellees petition.

For these reasons we make no argument in opposition to appellants' contention.

V.

Miscellaneous.

(a) Appellant in his statement of the case, in referring to some escrow instructions dictated by MacArthur, the broker, makes the following comment: "These instructions were not produced by Appellees, perhaps because they may have been destroyed long before this litigation for reasons which will hereafter become apparent." (Appellants Br. p. 6.)

If appellant infers by this statement that the appellees, Polikowsky, were guilty of destroying records of the Mutual Savings and Loan Association, the escrow holder, we wish it to be understood that such actions appear most unlikely, and we have no knowledge thereof. Nor can we see any point in their having done so, as the reasons have not thereafter become apparent.

(b) The Referee made quite a point out of his admission of evidence concerning the preliminary negotiations, and appellant has commented that no complaint on this point has been made. We feel that there is no need for comment. There was no attempt on the part of the appellees to avoid any of their actions in this case, nor any subterfuge. The fact that the original negotiations contemplated the placing of incumbrances on the property in favor of the vendor's does not alter the fact that no incumbrance was provided in the ultimate agreement. The lien was not waived by the preliminary negotiations.

"It is apparent that one cannot impliedly waive a right before such right exists. . . . It was not until later when he transferred to the defendants the legal title without payment of the consideration, that the law created for him a lien."

Maltby v. Conklin, 50 Cal. App. 201.

Conclusion.

In conclusion, Appellees Polikowsky respectfully submit that the conclusions of the District Court as drawn from the uncontroverted evidence should be sustained by this honorable court for the following reasons:

Their vendor's lien was not waived by the acceptance of security other than the personal obligation of the purchasers, as it would be abhorrent to equity to permit the Schmidts to claim that their dummy corporation should be considered a separate entity.

Their vendor's lien was not waived by agreeing to give a title to the effect that the public records would disclose no lien, a vendor's lien in its very essence being unrecorded.

The Appellees are not estopped from asserting the lien for the reason that no rights of innocent third parties are in any manner prejudiced.

And for the most basic reason that the very injustice of insisting that the property of these Appellees be subjected to the rights of general creditors who lent no credit nor even knew of this transfer is palpably unfair and inequitable.

Respectfully submitted,

JOHN K. BLANCHE,
*Attorney for Appellees, Clarence E.
and Winnifred Polikowsky.*

No. 14,608

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN LEE,

Appellant,

VS.

EDWIN B. SWOPE, Warden, or his Successor,
United States Penitentiary,
Alcatraz, California,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S OPENING BRIEF.

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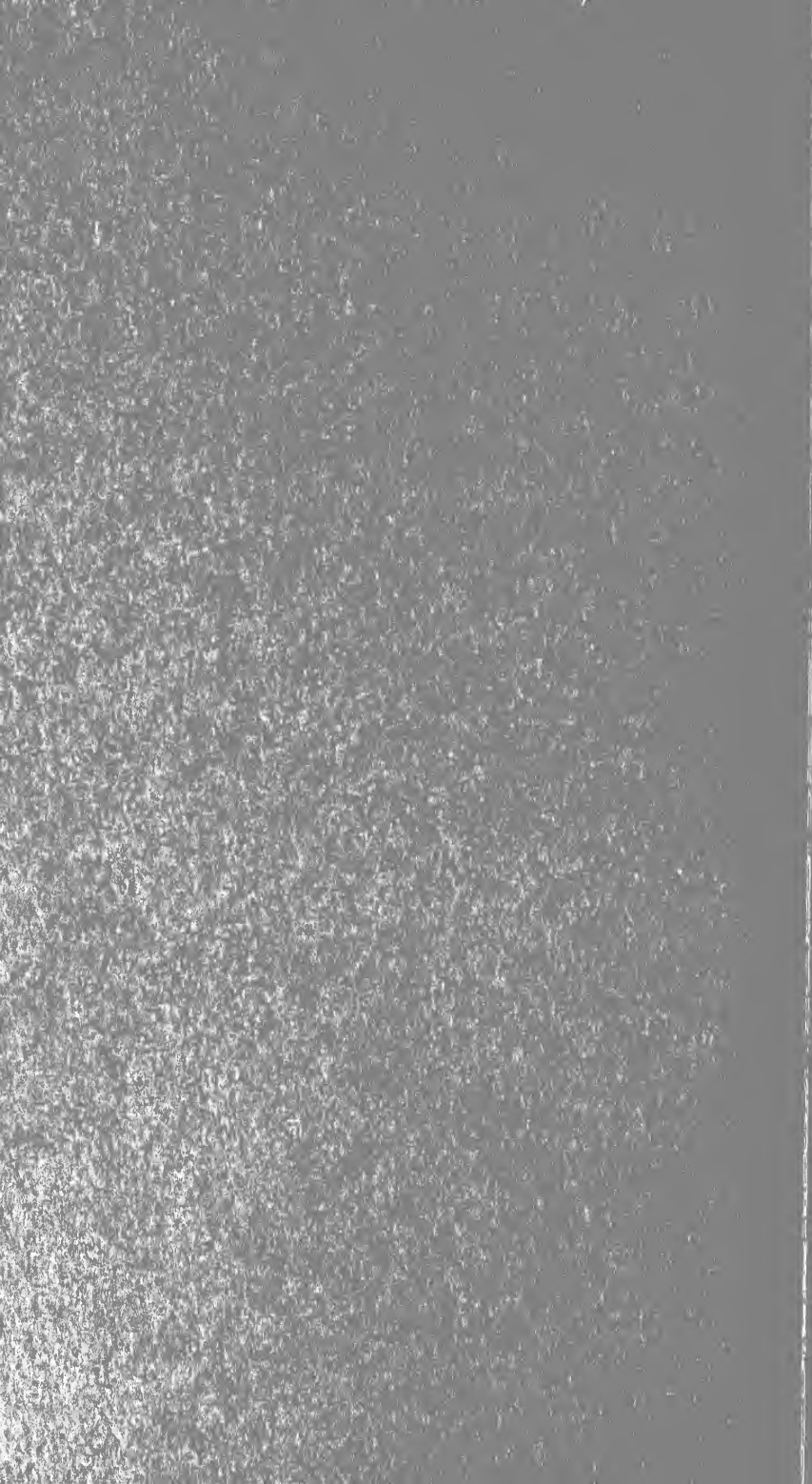
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FILED

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PAUL P. O'BRIEN,
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Subject Index

	Page
Jurisdictional statement	1
Statement of case	2
Specification of errors	4
Points relied upon by appellants.....	4
Summary of argument.....	5
Argument	5
Conclusion	11

Table of Authorities Cited

Cases	Pages
Guttermann v. Hiatt, 65 F. Supp. 285.....	5, 6, 7
Joblonowski v. State of New Jersey, 29 N.J.S. 114, 102 A. 2d 59	5, 7
Quinn v. Smith, 144 Pa. Super. 160, 19 A. 2d 504.....	7
State v. Ballard, 15 N.J.S. 417	7
Flannery v. Commanding General Second Service Com- mand, 69 F. Supp. 661.....	9, 11
Ex parte Milligan, 4 Wall. 2, 18 L.Ed. 281.....	10
Matter of Quinn, 317 U.S. 1.....	10

Statutes

Amendment 5, U.S.C.A.....	4, 5, 6, 8, 10
Amendment 5—" . . . nor be deprived of life, liberty or property, without due process of law. . . ."	
Amendment 6, U.S.C.A.....	4, 5, 6, 8, 9, 10
Amendment 6—"In all criminal prosecutions," etc.	
Title 10, U.S.C.A., Section 1473.....	9
Section 1473(e)—"All persons under sentence adjudged by courts-martial."	

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Appellee.

Appeal from the United States District Court for the
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Southern Division.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court arises under Section 2255, Title 28, U.S.C.A. in that the petitioner under and by order of the authority of the United States is in the custody of Edwin B. Swope, Warden, United States Penitentiary, Alcatraz, California under and by virtue of the judgment and sentence of a General Court-martial approved on the 28th day of March, 1947, as modified by an order of the Secretary of the Army on the 16th day of April 1949, sentencing peti-

tioner to a term of 20 years for armed robbery committed in France while petitioner was a member of the Army of the United States. Upon completion of such sentence petitioner will begin serving a life sentence, the result of a second General Court-martial conviction of September 13, 1949.

STATEMENT OF CASE.

Respondent, Edwin B. Swope, is the Warden of of the United States Penitentiary at Alcatraz, California and the person exercising general custodial authority over said institution and over the person of the petitioner herein.

Appellant was inducted into the Army of the United States at Washington County, Pennsylvania on December 4, 1942 for the duration of the war and six months and was given the Army Serial Number 33402971. On May 27, 1946 he was convicted by General Court-martial of armed robbery as set forth in paragraph I above. On June 12, 1947 he was dishonorably discharged from the Army of the United States and about the same time he was returned from overseas to confinement at the United States Army Disciplinary Barracks at Camp Cooke, California.

On September 13, 1949 petitioner was convicted of conspiracy to commit murder and was sentenced to death; later commuted to life imprisonment; said trial arising out of an incident which took place while petitioner was a prisoner at Camp Cooke, California.

On October 18, 1954 petitioner filed a petition for writ of habeas corpus in the United States District Court, Northern District of California, Southern Division, at San Francisco, California, being Civil Action No. 34131 (App. 2A) and an order to show cause was issued on the same date directed to United States Attorney and hearing on such was set for October the 21st, 1954.

On October 20, 1954 the United States Attorney, Lloyd H. Burke by Richard H. Foster, Assistant United States Attorney filed a return to order to show cause. (App. 10A.)

On October 21, 1954, a hearing on the order to show cause and the return thereto was had before the Honorable Oliver J. Carter, United States District Judge, at which time the respondent through his attorney, Richard H. Foster, argued that the petition for habeas corpus was premature inasmuch as the first General Court-martial conviction which sentenced petitioner to a term of 20 years would not expire, with past good time credit, until October 24, 1960 at which time petitioner would commence the life sentence, arising out of the second General Court-martial conviction of September 13, 1949, and that since petitioner was attacking the validity of the second conviction only, the Court was without jurisdiction since even if petitioner prevailed in such petition it could not result in his immediate release.

On October 22, 1954 the Honorable Oliver J. Carter, United States District Judge, entered a memorandum and order dismissing petitioner's petition for a writ

of habeas corpus without prejudice, and discharging the order to show cause. (App. 13A.)

SPECIFICATION OF ERRORS.

The Court below erred when it dismissed petitioner's petition for a writ of habeas corpus as having been prematurely brought and when it refused to take jurisdiction of the case at bar. The Court's refusal to pass on the merits of the case at bar, thus forcing an adjournment of the hearing on the merits for at least six years, amounts to a denial of due process and a fair and speedy trial in violation of the 5th and 6th Amendments to the United States Constitution.

POINTS RELIED UPON BY APPELLANTS.

The second Army General Court-martial which convicted petitioner on September 13, 1949, at Camp Cooke, California, and sentenced him to death, later commuted to life imprisonment, was without legal jurisdiction to try petitioner inasmuch as he had been discharged from the Army on June 12, 1947 and had been a civilian in custody of the Army authorities, but not under Army jurisdiction for more than two years before the events took place which gave rise to the second court-martial.

This petition and appeal is brought to have the second court-martial conviction set aside and to have petitioner tried in the Federal District Court of Cali-

for this alleged offense in keeping with his constitutional right under the Sixth Amendment to the United States Constitution.

SUMMARY OF ARGUMENT.

The Court below erred when it refused to take jurisdiction of the case at bar so as to inquire into the validity of the second General Court-martial which petitioner was attacking in his petition for writ of habeas corpus. Inasmuch as petitioner had exhausted his appellate remedies before filing the petition for a writ of habeas corpus, the Court's refusal to take jurisdiction had the effect of forcing an adjournment of a hearing on the merits of the second conviction to a date six years or more in the future thus having the effect of denying petitioner due process and a speedy and fair trial in contravention of his rights under the Fifth and Sixth Amendments to the United States Constitution.

ARGUMENT.

The Court below should have been governed by the recent cases of *Guterman v. Hiatt, Warden*, 65 F. Supp. 285 decided April 24, 1946 and *Albert Joblonowski, Petitioner v. State of New Jersey*, 29 N.J.S. 114, 102 A. 2d 59, decided December 4, 1953 wherein both Courts took jurisdiction to pass on the merits of the petitioner's petition for a writ of habeas corpus even though the petitioner was serving more than one

sentence and even though a favorable ruling for petitioner as to the sentence which he was attacking in his petition could not result in his immediate release. In the *Guttermann* case (supra) the Court did inquire into the merits of both sentences which were to run consecutively although the petition was brought several years before the second sentence had started to run. The Court said "In the instant case, however, we have considered petitioner's contentions as to both sentences in order that he may be fully advised in relation thereto." The Court denied petitioner's petition when it found that in each trial there had been only procedural error and not such jurisdictional error as would constitute a denial of due process under the Fifth or Sixth Amendments to the United States Constitution.

The Court in deciding the *Guttermann* case referred to its predecessor, *United States ex rel. Pruitt v. Hiatt, Warden*, 55 F. Supp. 993, decided July 17, 1944, wherein the Court had been confronted with a petition for a writ of habeas corpus and there were two consecutive sentences involved although petitioner in his petition was attacking only one of the sentences and hence even if jurisdictional error were shown as to the sentence attacked it could not have resulted in the petitioner's immediate release. However, the Court did take jurisdiction to inquire into the merits of the trials which resulted in both convictions and in ruling that there was mere procedural error and not jurisdictional error. The Court said, "In the instant case, however, we have considered petitioner's

contentions as to both sentences in order that he may be fully advised in relation thereto". The Court had recognized the rule as laid down in the *Pruitt* case, *supra*, but had actually taken jurisdiction to pass on the merits of the petition even though it could not have resulted in the petitioner's immediate release.

The same issue was decided in the New Jersey Supreme Court in the *Joblonowski* case, *supra*, decided approximately seven years later than the *Guttermann* case. In the *Joblonowski* case, decided December 4, 1953, the New Jersey Supreme Court was confronted with the same issues as had already been passed on in the *Pruitt* and *Guttermann* cases. After a discussion of both the *Pruitt* and *Guttermann* cases and their companion cases, the New Jersey Supreme Court said, "However, we think the prisoner should be entitled to some remedy now; evidence may be lost, witnesses may die or their memories fail, or the delay may work some other prejudice resulting in a denial of relief (*State v. Ballard*, 15 N.J. Super. 417, 422 (Appellate Div. 1951) Affirmed 9 N.J. 402. *Commonwealth ex rel. Quinn v. Smith*, 144 Pa. Super. 160, 191 F. 2d 504 (Supreme Court 1941)—hence in our view the better rule is that the writ is available to discharge him from confinement under the second sentence, even though he may actually remain in confinement by virtue of the third sentence". In the *Joblonowski* case there were four consecutive sentences involved and the petitioner was serving the first sentence at the time he brought the petition for habeas corpus attacking the second sentence.

In the case at bar it appears that the earliest possible date when petitioner could be freed from the first sentence would be on October 24, 1960 which is approximately six years in the future. To force an adjournment of a hearing on the merits of this second General Court-martial conviction for six years or possibly more into the future would very likely have the effect of resulting in a denial of due process and of the right to a speedy trial and the confrontation of the witnesses in violation of the Fifth and Sixth Amendments to the United States Constitution.

The second Army Court-martial which convicted petitioner on September 13, 1949 of conspiracy to commit murder and sentenced petitioner to death, later commuted to life imprisonment by the Secretary of the Army, was without legal jurisdiction to try the petitioner and hence the conviction and sentence rendered by such Court-martial is a nullity. On June 12, 1947, petitioner was discharged from the Army. At that time he became a "civilian", because his service with the Army was terminated as of that date. He was no longer a member of the Army and his legal status was again that of a civilian so as to bring him within his guaranteed rights under the Sixth Amendment to the United States Constitution. It is true that he was still in the custody of the Army authorities on June 10, 1949 when the event took place which gave rise to the second court-martial conviction. But he was a "civilian" in the custody of the Army, in time of peace, and as such was not within

the "land and naval forces" so as to exclude him from his constitutionally guaranteed rights under the Sixth Amendment.

The case at bar is much akin to the case of *United States ex rel. Flannery v. Commanding General Second Service Command, et al.*, 69 F. Supp. 661 (1946) wherein a soldier who had been employed by the United States Secret Service, prior to his induction into the Army in 1943, secured a discharge from the Army on September 24, 1945 under a special Army authority which granted such discharges in the interest of the "national health, safety or interest". When he filed his application for such discharge he held out that he planned to return to the Secret Service. The discharge which he was given did not entitle him to any mustering-out pay, but at his separation center he filed for and received mustering-out pay to which he was not entitled under his "hardship" discharge. On January 29, 1946 he was detained by the Army and arraigned before a court-martial on the charge that he had defrauded the government in that he had represented that he had intended to return to the Secret Service whereas he never had any intention to do so and in that he had committed a fraud to which he was not entitled for the type of discharge which he had received.

The Army contended that under Art. 38, 10 U.S. C.A., they retained jurisdiction to try the accused even though he had been discharged from the Army because he had committed a fraud against the Army

when he made false representations to secure his discharge.

The Court recognized that the only legal issue was whether the Army still had jurisdiction over the accused (citing *Matter of the Application of General Tomoyuki Yamashita*, 327 U.S. 1, 66 S.Ct. 340).

After making a lengthy discussion of the rights guaranteed to a person "except in cases arising in the land or naval forces", Amendment 5, U.S.C.A. and to the rights of the "accused" under the Sixth Amendment, the Court said, "A person discharged from his contract for military service who renders no military service, performs no military duty and receives no military pay is a "civilian"—"The constitutional provision for protection of life, liberty and property should be liberally construed in favor of the citizen"—A "case has not arisen in the land forces" within the constitutional requirement of presentment or indictment of grand jury in prosecutions for capital or infamous crimes except in "cases arising in land and naval forces if the soldier is discharged before the complaint is framed and the arrest is made."

In making its decision the Court said, "The least that can be attributed to this assumption ('while serving') is that it is presently an open question whether a discharged soldier can be tried by court-martial under the statute we are discussing. We feel obliged by the authorities we have cited, *Ex parte Milligan*, 4 Wall. 2, 18 L.Ed. 281; *Matter of Quinn*, 317 U.S. 1 (see also *Mosher v. Hunter*, 10 Cir., 143

F. 2d 745) to hold that the respondent's court-martial has no jurisdiction of the relator."

The rule laid down in the *Flannery* case, supra, is certainly applicable to the case at bar except that in the *Flannery* case the accused took an active part in securing the discharge by allegedly making false representations. If a fraud was committed by the soldier there is no question but that it was committed while he was in the Army and subject to the jurisdiction of the Army. But the Court ruled, in effect, that the Army had lost jurisdiction over the man when the discharge was executed. In the case at bar the accused had no part in the securing of the discharge, which was executed on June 12, 1947, other than that he received it. It was two years later that the act was committed for which the accused in this case was given the second court-martial. We submit that if the Army had lost jurisdiction over the person in the *Flannery* case, supra, then it would seem to follow as a matter of law that the Army had no jurisdiction to try Lee for an act which was committed two years after the execution of a discharge which was given by the Army and in which Lee took no part.

CONCLUSION.

It is respectfully submitted that, for the reasons stated herein, the judgment of the District Court should be reversed and the case remanded to that

Court with instructions to pass on the jurisdictional question in the case at bar.

Dated, February 18, 1955.

JACK L. BLAINE,
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No. 14,608

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MAR 28 1955

PAUL R. O'BRIEN, C

INDEX

	Page
Jurisdiction	1
Statement of the Case.....	2
Facts	2
Questions Presented	3
Argument	3
I. The Petition for a writ of habeas corpus is premature	3
II. There was jurisdiction to court martial appellant.....	6
Conclusion	9

Table of Authorities Cited

Cases

	Pages
Carter v. McClaughry, 183 U.S. 365.....	8
Craig, In re, 70 Fed. 969.....	7
Demaurez v. Squier (9th Cir.), 121 F.2d 960.....	5
Dunlap v. Swope (9th Cir.), 103 F.2d 19.....	5
Flannery v. Commanding General, 69 F. Supp. 661.....	8
Graham v. Squier (9th Cir.), 145 F.2d 348.....	5
Kahn v. Anderson, 255 U.S. 1.....	7, 8
McDonald v. Johnston (9th Cir.), 149 F.2d 768.....	5
McNally v. Hill, 293 U.S. 131.....	4
McNealy v. Johnston (9th Cir.), 100 F.2d 280.....	5
Melendez, Ex parte (9th Cir.), 98 F.2d 791.....	5
Mobley v. Handy, 176 F.2d 491.....	9
Mosher v. Hudspeth, 123 F.2d 401.....	8
Mosher v. Hunter, 143 F.2d 745.....	8
Oddo v. Swope (9th Cir.), 193 F.2d 492.....	5
Perlstein v. United States, 151 F.2d 167.....	9
Steele v. Humphrey, 80 F. Supp. 544.....	8
Woollomes v. Heinze (9th Cir.), 198 F.2d 577.....	5

Statutes

10 United States Code, Section 1473 (Article of War 2)....	6, 8, 9
28 United States Code, Sections 2241, 2242, 2243, 2253, 2255	1

No. 14,608

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOHN LEE,

Appellant,

vs.

EDWIN B. SWOPE, Warden, or his Successor, United States Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Section 2255 of Title 28 United States Code. Since appellant is a military prisoner, sentenced by a military court martial, it would appear that Section 2255 does not apply to this proceeding. This action was for a writ of habeas corpus and apparently was pursuant to Sections 2241, 2242 and 2243 of Title 28 United States Code. Appeal in a habeas corpus proceeding is provided by Section 2253 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant filed a petition for a writ of habeas corpus on October 18, 1954 (Tr. 3-7). United States District Judge Oliver J. Carter issued an order to show cause that same day (Tr. 8). E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, filed a return to the order to show cause on October 20, 1954 (Tr. 9-23). A memorandum of points and authorities was filed by appellant on October 21, 1954 (Tr. 25-34). Judge Carter filed a memorandum and order dismissing the petition for a writ of habeas corpus and discharged the order to show cause on October 22, 1954 (Tr. 34-36). Appeal was timely made to this Court from that order (Tr. 36).

FACTS.

Appellant is confined by virtue of the judgment and sentence of a General Court Martial approved on March 28, 1947 (Tr. 10, 35). This sentence is for a term of 20 years and was adjudged for the crime of robbery (Tr. 16-20). Appellant is eligible for release on this sentence October 24, 1960 (Tr. 23). The validity of this sentence is not challenged (Tr. 35). The sentence which appellant attacks will commence on October 24, 1960 (Tr. 23). This sentence is one for murder, and it is for a life term (Tr. 23). Appellant was given a dishonorable discharge from the United States Army on June 12, 1947 (Tr. 10). The judgment of conviction which appellant attacks was im-

posed on September 13, 1949 (Tr. 10) for a crime committed while he was a prisoner at the Branch United States Disciplinary Barracks, Camp Cooke, California (Tr. 4, 21). Appellant alleges that at the time of the murder for which he was convicted he was a "civilian" in Army control, and the court martial which tried him was without legal jurisdiction (Tr. 5). Appellant has appealed his conviction and sentence to the Judge Advocate General and Secretary of the Army (Tr. 4).

QUESTIONS PRESENTED.

1. In a habeas corpus proceeding may the validity of a sentence be questioned before the sentence commences?
 2. Is there court martial jurisdiction after discharge over prisoners serving a sentence by virtue of a court martial?
-

ARGUMENT.

I. THE PETITION FOR A WRIT OF HABEAS CORPUS IS PREMATURE.

Appellant is presently serving a sentence, the validity of which he does not challenge (Tr. 35). This sentence will expire on October 24, 1960 (Tr. 23). The murder sentence which appellant questions will not commence to run until that date (Tr. 23).

Appellant argues that the Court should have passed on the merits of his petition despite the fact that a favorable ruling on the sentence which he was attacking could not result in his immediate release (Appellant's Brief, page 6). In support of this position appellant cites several state cases and two District Court opinions which commented on the merits of petitioners' cases despite the fact that the petitions were premature. Appellant urges that postponing an adjudication on the merits of his second sentence would, in the event that this sentence were reversed, deny him due process, the right to a speedy trial, and the right to confront witnesses (Appellant's Brief, page 8).

In our opinion, appellant has misconceived the nature of a writ of habeas corpus. Habeas corpus is not a substitute for appeal. Its only function is to determine legality of present detention. The only judicial relief authorized is the discharge of the prisoner. *McNally v. Hill*, 293 U.S. 131, 136. In the case last cited the Supreme Court declared that diligent search of the English cases before the adoption of the Constitution "has failed to disclose any case where the writ was sought or used, either before or after conviction, as a means of securing the judicial decision of any question which, even if determined in the prisoner's favor, could not have resulted in his immediate release." *McNally v. Hill*, supra, page 138. The Court held that the use of habeas corpus where the petitioner is confined under an admittedly

valid sentence is unauthorized by the statutes of the United States (at page 140).

This Court has many times been asked to inquire into the validity of a sentence where a favorable decision would not result in the petitioner's immediate release. Without exception this Court has held that the petition was premature and that habeas corpus could not be so used. *See ex parte Melendez* (9th Cir.), 98 F.2d 791; *McNealy v. Johnston* (9th Cir.), 100 F.2d 280; *McDonald v. Johnston* (9th Cir.), 149 F.2d 768; *Dunlap v. Swope* (9th Cir.), 103 F.2d 19; *Graham v. Squier* (9th Cir.), 145 F.2d 348; *Demaurez v. Squier* (9th Cir.), 121 F. 2d 960; *Oddo v. Swope* (9th Cir.), 193 F.2d 492; *Woolomes v. Heinze* (9th Cir.), 198 F.2d 577.

Appellant argues that a failure to inquire into the merits of his second conviction will deny him the right to a speedy trial. This is a somewhat unusual interpretation of the constitutional requirement. Appellant was convicted. He had a trial. He now seeks to set that trial aside. It has never been held, to our knowledge, that where judgment has been set aside, the defendant's rights have been violated by a new trial. Appellant argues that he will be deprived of the right to confront witnesses apparently because of the length of time which has elapsed from the murder conviction. The government, however, rather than appellant, is likely to be handicapped by this time lapse. If by some chance appellant's conviction were to be reversed after all these years, the Army

would be faced with an almost impossible task in finding and locating the witnesses necessary to prove its charges. The probabilities are that some witnesses have died and that the majority no longer recall the evidence with any clarity at all.

Appellant has not shown how his case, even assuming all he says to be true, would differ from any other case where the petitioner was serving a lengthy valid sentence. No reason is given for this Court to overrule its prior decisions.

II. THERE WAS JURISDICTION TO COURT MARTIAL APPELLANT.

Appellant argues that since he had received a dishonorable discharge prior to the time the murder took place there was no court martial jurisdiction. The facts were that appellant was given a dishonorable discharge on June 12, 1947 (Tr. 10). The murder occurred while he was a prisoner at the Branch United States Disciplinary Barracks, Camp Cooke, California, on June 10, 1949. He was still an Army prisoner on the date of his murder court martial (Tr. 10). Section 1473 of Title 10 (Article of War 2) provides in part as follows:

“The following persons are subject to these articles and shall be understood as included in the term ‘any person subject to military law,’ or ‘persons subject to military law,’ whenever used in these articles: . . . All persons under sentence adjudged by courts-martial;”

At the time the evidence which led to appellant's court martial took place, he was under sentence of robbery adjudged by a court martial approved on March 28, 1947 (Tr. 10, 35).

It has been settled since 1895 that persons who commit offenses while serving a sentence adjudged by a court martial are subject to court martial in spite of the fact that they have been dishonorably discharged from military service. In that year the case of *In re Craig*, 70 Fed. 969, was decided. In that case the petitioner was dishonorably discharged and confined at Leavenworth Military Prison for the offense of desertion. While there he assaulted the Commandant and was tried by court martial. The Court examined Article of War 2 and declared that this statute was not unconstitutional, and held that there was jurisdiction to try discharged prisoners serving military sentences.

The Supreme Court decided the question in 1920 in the case of *Kahn v. Anderson*, 255 U.S. 1. This case is indistinguishable from the instant one. In the *Kahn* case the petitioners were convicted of conspiracy to murder a fellow prisoner. The alleged offense occurred while they were confined at the United States Disciplinary Barracks at Leavenworth. The petitioners contended that by the sentence under which they were confined at the time of the alleged murder they had ceased to be soldiers and were no longer subject to military law. The Court held:

"But, as the allegations of the petition and the contention based upon them concede that the peti-

tioners were, at the time of the trial and sentence complained of, military prisoners undergoing punishment for previous sentences, we are of opinion that, even if their discharge as soldiers had resulted from the previous sentences which they were serving, it would be here immaterial, since, as they remained military prisoners, they were for that reason subject to military law and trial by court-martial for offenses committed during such imprisonment."

Kahn v. Anderson, supra, page 7.

In *Carter v. McClaughry*, 183 U.S. 365, 383, it was said in reference to the petitioner in that case:

"He was a military prisoner though he has ceased to be a soldier; and for offences committed during his confinement he was liable to trial and punishment by court martial under the rules and articles of war."

Other cases which have held that prisoners under sentence of a court martial are subject to military law are *Mosher v. Hunter*, 143 F.2d 745; *Mosher v. Hudspeth*, 123 F.2d 401, cert. den., and *Steele v. Humphrey*, 80 F. Supp. 544.

The one case cited by appellant in support of the contention that as a civilian he could not be subject to military law is a District Court case. *Flannery v. Commanding General*, 69 F. Supp. 661. This case did not involve a court martial prisoner. The Court expressly declared that the interpretation of Section 1473 (Article of War 2) was not involved.

The substance of appellant's argument is that a civilian may not be tried by court martial. This is not the law. Article of War 2 provides that retainers to the camp and persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States are subject to military law. In time of war those civilians accompanying or serving with the Army of the United States in the field may be court martialed. For representative cases dealing with these classes of civilians see *Perlstein v. United States*, 151 F.2d 167 and *Mobley v. Handy*, 176 F.2d 491.

CONCLUSION.

Appellant's claim that a military prisoner may not be tried by court martial is without merit and, furthermore, appellant may not raise this question until 1960. The judgment below should be affirmed.

Dated, San Francisco, California,
March 28, 1955.

LLOYD H. BURKE,
United States Attorney,

RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellee.

No. 14,608

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOHN LEE,

Appellant,

vs.

EDWIN B. SWOPE, Warden, or his
Successor, United States Penitentiary,
Alcatraz, California,

Appellee.

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

APPELLANT'S REPLY BRIEF.

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FILED

MAY 24 1955

PAUL B. GIBBEN, CLERK

Table of Authorities Cited

Cases	Pages
Carter v. McClaughry, 183 U.S. 365.....	3
Craig, In re, 70 Fed. 969.....	1, 2
Kahn v. Anderson, 255 U.S. 1.....	2
Mobley v. Handy, 176 F. 2d 491.....	3, 4
Mosher v. Hudspeth, 123 F. 2d 401.....	2
Mosher v. Hunter, 143 F. 2d 745.....	2
Perlstein v. United States, 151 F. 2d 167.....	3, 4
Weitz, Ex parte (D.C.D.Mass., 1919), 256 Fed. 58.....	6, 7

Constitutions

Constitution of the United States:

Fifth Amendment	5
Sixth Amendment	5

No. 14,608

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOHN LEE,

Appellant,

vs.

EDWIN B. SWOPE, Warden, or his
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Alcatraz, California,

Appellee.

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

APPELLANT'S REPLY BRIEF.

Now comes John Lee, appellant in the above-entitled cause by his attorneys, Jack L. Blaine, Charles Upton Shreve and Carl L. Rhoads, and as a reply to brief for appellee doth make the following argument, to-wit:

The respondent has cited the case of *In re Craig*, 70 Fed. 969, as his principal authority to show that the general court-martial which sentenced John Lee would in fact have jurisdiction to try him by court martial notwithstanding the fact that he had been

dishonorably discharged two years prior to the date of the offense for which tried. It is true that the facts of such case are quite similar to the case at bar, but we must take into consideration the fact that such case was decided 60 years ago and that the Uniform Code of Military Justice which now is the legal authority for courts-martial is considerably different than the old code then in effect and that in the present day the more enlightened Congress has apparently seen fit to more carefully safeguard the rights of military and naval personnel than had been done heretofore.

The respondent also cites the case of *Kahn v. Anderson*, 255 U.S. 1 as being a companion case to *In re Craig*, supra, but a careful examination of such case shows that such case is not in point with the case at bar inasmuch as in the *Kahn* case the dishonorable discharge had not been executed prior to the date of the commission of the offense for which the accused was subsequently tried by a second court-martial and which sentence was challenged on the point of jurisdiction by a writ of habeas corpus. It is true that the dictum of the *Kahn v. Anderson* case, supra, and of *Mosher v. Hudspeth*, 123 F.2d 401 and *Mosher v. Hunter*, 143 F.2d 745 (both cases involve the same petitioner, the *Hudspeth* case having been tried on a writ of habeas corpus in 1941 and the *Hunter* case in 1944) also have dictum which refers back to the *Kahn v. Anderson* and *In re Craig* cases, supra, but such Courts did not have to pass on the issue of the case at bar in that they were confronted with the situation

where the accused had in fact been discharged prior to the commission of the offense for which he was subsequently brought to trial by court-martial.

The case of *Carter v. McClaughry*, 183 U.S. 365, 383, which the respondent also cites does not appear to be in point inasmuch as Captain Carter, an Army officer, who was challenging the jurisdiction of the court-martial to try him and wherein the Court ruled against him had never been discharged from the Army and was without question an United States Army Officer on active duty with the Army at the time of the commission of the embezzlement for which he was brought to trial by court-martial. He had in fact been detailed to a river improvement program and in his habeas corpus proceeding he was questioning the jurisdiction of the Court only in so far as he alleged that he was twice put in jeopardy because the sentence of general court-martial was greater than the court-martial had jurisdiction to inflict on any one of the several Courts taken singularly with which he was charged. In other words he was arguing that there was multiplicity of Courts all arising out of the same transaction. The Court rightly ruled against him on this point, but such point is certainly not in issue in the case at bar.

The respondent has also cited the case of *Perlstein v. United States*, 151 F.2d 167 and *Mobley v. Handy*, 176 F.2d 491 as illustrating the type of case wherein the military retains jurisdiction over the civilian. In the *Perlstein* case a soldier was discharged in the country of Eritrea on the 19th of September, 1942,

but took a job as a civilian with one of the contractors who was engaged in salvage operations as part of an Army project. On the 26th of September one week after his discharge and while employed as a civilian by the contractor he committed larceny for which he was subsequently brought to trial by court-martial. He challenged the jurisdiction of the court-martial on a writ of habeas corpus, and the Court rightly ruled that he was a "person accompanying the armies of the United States in the field in time of war".

In the *Mobley* case, *supra*, the accused was attached to the Army as an employee at a post exchange in Germany and was arrested after the state of war had ceased to exist between the United States and Germany. Before he was brought to trial by court-martial his term of enlistment expired, and he was discharged. He later broke arrest and returned to the United States and was subsequently apprehended by the military police in Texas and returned to Germany where he was forced to stand trial by general court-martial. He also raised the question of jurisdiction of the court-martial to try him at a time after his discharge had in fact been executed. The Court in that case as in the *Perlstein* case, *supra*, ruled against the petitioner and held the court-martial did in fact have jurisdiction to try him, because he was a "person accompanying the armies of the United States in the field". Such rulings are clearly understandable but were clearly not applicable to the case at bar inasmuch as the petitioner in the case at bar was not outside the United States and so clearly was

not a "person accompanying the armies of the United States in the field". The only section of Article 2 which is applicable to this case is Section 2 E which provides that a person is subject to court-martial when he is in custody serving a sentence imposed by court-martial. If we examine Section 2 E further, it is very apparent that Congress never intended that the Courts carry such provision to such an extreme as to hold that the Army retains jurisdiction over him after he had been effectively discharged.

There are many cases which could be cited, and I do not believe that it will even be argued by the respondent that if a convicted military prisoner is discharged and is subsequently transferred to a civilian penitentiary and while there commits a crime even though it might be a crime against a member of the active military forces he would be brought to trial for such an offense as a civilian and hence would be afforded his rights under the Fifth and Sixth Amendments to the Constitution. Such would unquestionably be the result even though he had only recently been transferred to such prison and even if he had many years yet to serve on the sentence which had been adjudged by court-martial. We submit that if a discharged military prisoner is a civilian under such circumstances so as to be entitled to his vested rights under the Fifth and Sixth Amendments to the Constitution, then by the same token the soldier who is discharged under similar conditions although he might be retained in the custody of military authorities in the United States to serve such sentence, he has never-

theless had a "change of status" from a "person subject to the code" to that of a "civilian" and that such change of status is just as real as if he were transferred to a federal civilian penitentiary to serve the sentence imposed upon him. It is well recognized that a court-martial is a Court of limited jurisdiction, and the Courts should be very careful to limit but not to broaden the scope of jurisdiction of such Court over that which the Congress intended to give it. We submit that after a military prisoner has been discharged from the Army, is not receiving pay or allowances, he cannot be required to fight for his country and cannot be restored to duty, but is nevertheless in custody of the Army at a military installation in the United States, then he is in fact a civilian and for all practical purposes he is the same as any civilian laborer that happens to be employed by the Army at that particular installation in the United States.

It has been clearly demonstrated in the case of *Ex parte Weitz*, D.C.D. Mass. 1919, 256 F. 58, 59 that such a civilian even though working on a military establishment is not subject to trial by court-martial. In 1919 one Weitz was a civilian chauffeur employed by a contractor doing construction work at Camp Devens, Massachusetts during World War I. While transporting the contractor's employees about the camp, the automobile he was driving ran into and killed a soldier. On being held by the military authorities he applied for a writ of habeas corpus. The writ was allowed on the ground that Weitz was not "accompanying or serving with the Armed

Forces'', because his work had no "direct relation to the transport, maintenance or supply of any Army in the field''. The Court did recognize that if Weitz had been so employed he would have been subject to court-martial jurisdiction.

We submit that the *Weitz* case, supra is in fact much akin to the case at bar and that the petitioner, John Lee, was in fact a civilian in the custody of the Army but not under its legal jurisdiction at the time of the alleged offense for which he was court-martialed and which sentence is being tested by this petition for writ of habeas corpus for the reasons above cited as well as the argument presented in appellant's opening brief and supplemental brief.

We submit that the court-martial which convicted John Lee on September 13, 1949 was fully without jurisdiction to try him and hence that his case should be remanded to the Federal District Court for proper disposition before the Federal District Attorney.

Dated, May 11, 1955.

JACK L. BLAINE,
CHARLES UPTON SHREVE,
CARL L. RHOADS,
Attorneys for Appellant.

No. 14609

United States
Court of Appeals
for the Ninth Circuit

S. D. HAHN, as Administrator of the Estate of
Young D. Hahn, Deceased,

Appellant,

vs.

SARAH E. PADRE, as Administratrix of the
Estate of Herbert Huxley Hahn, Deceased,
Appellee.

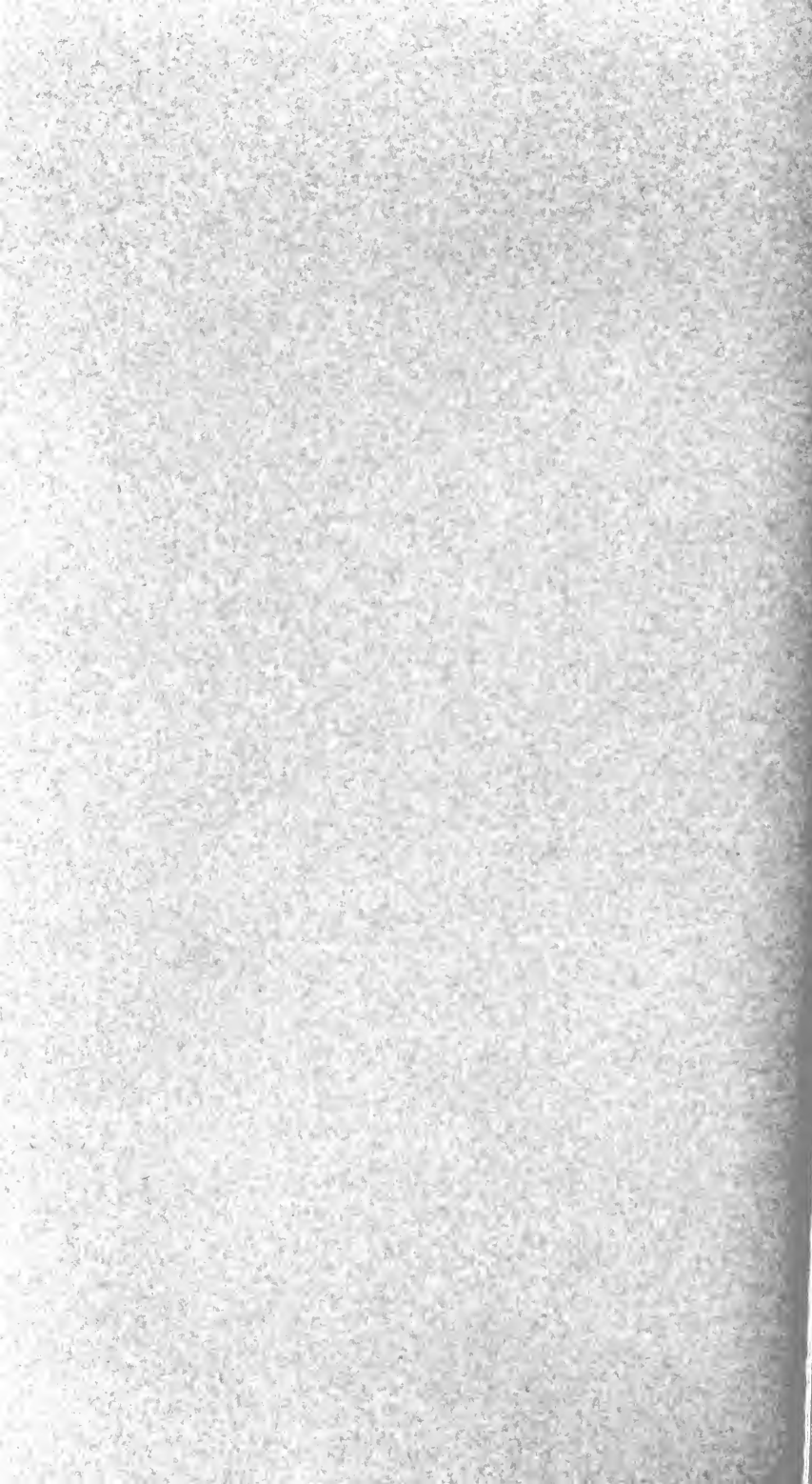
Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

APR 18 1955

PAUL P. O'BRIEN, CLERK



No. 14609

United States
Court of Appeals
for the Ninth Circuit

S. D. HAHN, as Administrator of the Estate of
Young D. Hahn, Deceased,
Appellant,

vs.

SARAH E. PADRE, as Administratrix of the
Estate of Herbert Huxley Hahn, Deceased,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer of Cross-Defendant S. D. Hahn.....	17
Answer of Cross-Defendant Sarah E. Padre..	9
Appeal:	
Certificate of Clerk to Transcript of Record	
on	37
Notice of	35
Statement of Points to be Relied Upon on..	182
Certificate of Clerk to Transcript of Record..	37
Cross-Complaint in Interpleader of S. D. Hahn	3
Cross-Complaint in Interpleader of Sarah E.	
Padre	11
Deposition of Dr. Gustavo Arevalo.....	99
Deposition of Celestinno Lupercio Perez.....	137
Findings of Fact and Conclusions of Law....	29
Judgment	33
Names and Addresses of Attorneys.....	1
Notice of Appeal	35

ii.

Notice of Motion for Order Continuing Date of Hearing	19
Affidavit of Harry E. Templeton.....	20
Notice of Motion for Order Re-Opening Case for Additional Evidence or for a New Trial	23
Affidavit of Harry E. Templeton.....	24
Affidavit of Ernestine Thomas.....	28
Statement of Points to be Relied Upon (USCA)	182
Transcript of Proceedings and Evidence, Feb. 8, Mar. 15, 1954	38
Witnesses:	
Arevalo, Dr. Gustavo (Deposition)...	99
—direct	100, 111, 119
—voir dire	106, 114
—cross	124
—redirect	136
Bello, Jose	
—direct	61
—cross	63
—redirect	64
Cruevas, Galdino Losa	
—direct	76
—cross	86
—redirect	93
—recross	95
Hahn, William J.	
—direct	68, 74

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Luna-Ramirez, Marcario

—direct	47
—cross	51
—redirect	60

Perez, Celestinno Lupercio (Deposition) 137

—direct	139, 147
—voir dire	146
—cross	153
—redirect	157
—recross	158

Transcript of Proceedings and Testimony, Aug.

16, 1954	160
----------------	-----

Witness:

Ritchy, Bert

—direct	161
—cross	166

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* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court, Southern District of California, Central Division

No. 15951-BH

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a corporation, Plaintiff,

vs.

SARAH E. PADRE, etc., et al., Defendants.

S. D. HAHN, as Administrator of the Estate of
Young D. Hahn, Deceased, Cross-Complainant,

vs.

SARAH E. PADRE, as Administratrix of the
Estate of Herbert Huxley Hahn, Deceased,
Cross Defendant.

CROSS COMPLAINT IN INTERPLEADER

I.

Jurisdiction exists in the above entitled court under and by virtue of judgment heretofore made and entered November 27, 1953, in the above entitled matter in which cross complainant and cross defendant herein were both ordered to interplead their rights to the proceeds from certain insurance policies.

II.

That Young D. Hahn died intestate on the 18th day of April, 1953, at which time he was a resident of the County of Los [15] Angeles, State of California, that subsequent thereto, on the 14th day of

May, 1953, S. D. Hahn was appointed as administrator of the estate of Young D. Hahn, deceased, duly qualified as such and has ever since acted as such administrator.

III.

That Herbert Huxley Hahn died intestate on the 18th day of April, 1953, at which time he was a resident of the County of San Bernardino, State of California, that subsequent thereto, on the 12th day of June, 1953, Sarah E. Padre was appointed as administratrix of the estate of Herbert Huxley Hahn, deceased, duly qualified as such and has ever since acted as such administratrix.

IV.

On or about May 15, 1941, pursuant to written application therefor, The Prudential Insurance Company of America issued its Juvenile 20-Year Payment Life Policy of Insurance No. D 11 559 107 upon the life of Herbert H. Hahn, also known as Herbert Huxley Hahn, named as the insured thereunder. Said policy of insurance is in the ultimate face amount of One Thousand Dollars (\$1,000.00) and when issued and delivered as aforesaid, named and designated as beneficiary thereunder Young D. Hahn, father of the insured. Said policy of insurance provided and provides, among other things, that the face "amount of insurance," as therein defined together with any accumulated and post mortem dividends credited to said policy are payable upon legal surrender of said policy at the

Home Office of said insurance company, immediately upon receipt at said Home Office of due proof of the death of the insured. Accumulated dividends with interest in the amount of Twenty-Eight Dollars and Nineteen Cents (\$28.19) and a post mortem dividend in the amount of Three Dollars and Thirty-Three Cents (\$3.33) together with the return of premium in the amount of One Dollar and Seventy-Two Cents (\$1.72) have been credited to said policy of insurance. [16]

V.

On or about March 7, 1944, pursuant to written application therefor, The Prudential Insurance Company of America issued its Juvenile 20-Year Endowment Policy of Insurance No. 12 828 454 upon the life of Herbert H. Hahn, also known as Herbert Huxley Hahn, named as the insured thereunder. Said policy of insurance is in the ultimate face amount of One Thousand Dollars (\$1,000.00) and when issued and delivered as aforesaid, named and designated as beneficiary thereunder Young D. Hahn, father of the insured. Said policy of insurance provided and provides, among other things, that the face "amount of insurance," as therein defined together with any accumulated and post mortem dividends credited to said policy are payable upon legal surrender of said policy at the Home Office of said insurance company, immediately upon receipt at said Home Office of due proof of death of the insured. Accumulated dividends with interest in the amount of Thirty-Six Dollars and Twenty

Cents (\$36.20) and a post mortem dividend in the amount of Five Dollars and Fifty-Seven Cents (\$5.57) have been credited to said policy of insurance.

VI.

On or about March 7, 1944, pursuant to written application therefor, The Prudential Insurance Company of America issued its Juvenile 20-Year Endowment Policy of Insurance No. 12 828 455 upon the life of Herbert H. Hahn, also known as Herbert Huxley Hahn, named as the insured thereunder. Said policy of insurance is in the ultimate face amount of One Thousand Dollars (\$1,000.00) and when issued and delivered as aforesaid, named and designated as beneficiary thereunder Young D. Hahn, father of the insured. Said policy of insurance provided and provides, among other things, that the face "amount of insurance," as therein defined together with any accumulated and post mortem dividends credited to said policy are payable upon legal surrender of said policy at the Home [17] Office of due proof of the death of the insured. Accumulated dividends with interest in the amount of Thirty-Six Dollars and Twenty Cents (\$36.20) and a post mortem dividend in the amount of Five Dollars and Fifty-Seven Cents (\$5.57) have been credited to said policy of insurance.

VII.

On or about March 20, 1944, pursuant to written application therefor, The Prudential Insurance Company of Insurance issued its Juvenile 20-Year

Endowment Policy of Insurance No. 12 828 456 upon the life of Herbert H. Hahn, also known as Herbert Huxley Hahn, named as the insured thereunder. Said policy of insurance is in the ultimate face amount of One Thousand Dollars (\$1,000.00) and when issued and delivered as aforesaid, named and designated as beneficiary thereunder Young D. Hahn, father of the insured. Said policy of insurance provided and provides, among other things, that the face "amount of insurance," as therein defined together with any accumulated and post mortem dividends credited to said policy are payable upon legal surrender of said policy at the Home Office of said insurance company, immediately upon receipt at said Home Office of due proof of the death of the insured. Accumulated dividends with interest in the amount of Thirty-Six Dollars and Sixteen Cents (\$36.16) and a post mortem dividend in the amount of Five Dollars and Fifty-Seven Cents (\$5.57) have been credited to said policy of insurance.

VIII.

That by virtue of Judgment in Interpleader made and entered November 27, 1953, the Prudential Insurance Company of America has deposited the sum of Four Thousand One Hundred Fifty-Eight Dollars and Fifty-One Cents (\$4,158.51) with the Clerk of this court, said sum being the full proceeds payable by virtue of Policies of Insurance Nos. D 11 559 107; 12 828 454; 12 828 455; and

12 828 456, upon the life of Herbert H. Hahn, also known as [18] Herbert Huxley Hahn.

IX.

That the insured, Herbert H. Hahn, also known as Herbert Huxley Hahn, and the named beneficiary, Young D. Hahn, died as a result of a common traffic disaster in Baja California, April 18, 1953. That the insured, Herbert H. Hahn, also known as Herbert Huxley Hahn, predeceased the beneficiary, Young D. Hahn.

X.

That the estate of Young D. Hahn is entitled to the proceeds of said policies of insurance on deposit with the clerk of this court by reason of his being the duly named and designated beneficiary thereunder.

Wherefore, cross complainant prays that this court adjudge and determine that cross complainant is entitled to the sum of Four Thousand, One Hundred Fifty-Eight Dollars and Fifty-One Cents (\$4,158.51) now in the possession of the clerk of this court representing the proceeds of The Prudential Insurance Company of America Policies Nos. D 11 559 107; 12 828 454; 12 828 455; 12 828 456, upon the life of Herbert H. Hahn, also known as Herbert Huxley Hahn, and that the clerk be ordered and directed to pay the same to the cross com-

plainant; and that cross complainant be awarded his costs, and all other proper relief.

EDWARD CARTER MADDUX,
/s/ EDWARD CARTER MADDUX,
Attorney for Cross Complainant

Duly Verified.

Affidavit of Service by Mail attached. [20]

[Endorsed]: Filed December 29, 1953.

[Title of District Court and Cause.]

ANSWER OF CROSS-DEFENDANT SARAH
E. PADRE, as Administratrix of the Estate of
Herbert Huxley Hahn, Deceased

I.

Cross-defendant admits the allegations of Paragraphs I, IV, V, VI, VII and VIII of the cross-complaint in interpleader.

II.

This cross-defendant has no information or belief sufficient to enable her to answer the same, and therefore and on that ground she denies that Young D. Hahn died intestate on the 18th day of April, 1953; on the contrary this cross-defendant [21] alleges on information and belief that said Young D. Hahn died on the 19th day of April, 1953.

Cross-defendant admits the remaining allegations of said paragraph II.

III.

This cross-defendant has no information or belief sufficient to enable her to answer the same, and therefore and on that ground she denies that Herbert Huxley Hahn died intestate on the 18th day of April, 1953; on the contrary this cross-defendant alleges on information and belief that said Herbert Huxley Hahn died on the 19th day of April, 1953.

Cross-defendant admits the remaining allegations of said paragraph III.

IV.

Answering the allegations of paragraph IX of said cross-complaint, this cross-defendant alleges she has no information or belief sufficient to enable her to answer the same, and therefore and on that ground denies that said Herbert H. Hahn also known as Herbert Huxley Hahn, the insured, or Young D. Hahn, the beneficiary died on the 18th day of April, 1953. This cross-defendant denies on information or belief that the insured, Herbert H. Hahn, also known as Herbert Huxley Hahn, predeceased the beneficiary, Young D. Hahn; on the contrary this cross-defendant is informed and believes and upon such information and belief alleges that said Young D. Hahn the beneficiary predeceased the insured Herbert H. Hahn, also known as Herbert Huxley Hahn.

V.

This cross-defendant denies generally and specifically each and every allegation in paragraph X of said cross-complaint contained.

Wherefore this cross-defendant prays that this court adjudge and determine that cross-defendant is entitled to the sum of four thousand one hundred fifty-eight dollars and fifty-one [22] cents, (\$4,-158.51) now in the possession of the Clerk of this court representing the proceeds of the policies of insurance set forth and described in said cross-complaint, and that the clerk be ordered and directed to pay the same to the cross-defendant; that cross-defendant be awarded her costs, and all other proper relief.

TEMPLETON AND MILLER,

/s/ By HARRY E. TEMPLETON,

Attorneys for Cross-Defendant [23]

Duly Verified.

Affidavit of Service by Mail attached. [24]

[Endorsed]: Filed January 7, 1954.

[Title of District Court and Cause.]

CROSS-COMPLAINT IN INTERPLEADER

I.

Jurisdiction exists in the above entitled court under and by virtue of judgment heretofore made and entered November 27, 1953, in the above entitled matter in which cross-complainant and cross-defendant herein were both ordered to interplead their rights to the proceeds of certain insurance policies.

II.

Cross-complainant is informed and believes and

upon such information and belief alleges that Herbert Huxley Hahn died on the [25] 19th day of April, 1953; that at the time of his death said Herbert Huxley Hahn was a resident of the County of San Bernardino, State of California; that thereafter and on the 12th day of June, 1953, cross-complainant was in proceeding No. 23427 In the Superior Court of the State of California, In and for the County of San Bernardino, appointed administratrix of the estate of said Herbert Huxley Hahn, deceased; thereafter cross-complainant qualified as administratrix and ever since said time has been and now is the duly appointed, qualified and acting administratrix of the estate of Herbert Huxley Hahn, deceased.

III.

That cross-complainant is informed and believes and upon such information and belief alleges that Young D. Hahn died on the 19th day of April, 1953; that at the time of his death said Young D. Hahn was a resident of the County of Los Angeles, State of California; that thereafter and on the 15th day of May, 1953, cross-defendant S. D. Hahn was in probate proceeding 340533 In the Superior Court of the State of California, In and for the County of Los Angeles appointed administrator of the estate of said Young D. Hahn, deceased; that thereafter cross-defendant qualified as administrator and ever since said time has been and now is the duly appointed, qualified and acting administrator of the estate of Young D. Hahn, deceased.

IV.

On or about May 15, 1941, pursuant to written application therefor, The Prudential Insurance Company of America issued its Juvenile 20-year Payment Life Policy of Insurance No. D 11 559 107 upon the life of Herbert H. Hahn, also known as Herbert Huxley Hahn, named as the insured thereunder. Said policy of insurance is in the ultimate face amount of one thousand dollars (\$1,000.00) and when issued and delivered as aforesaid, named and designated as beneficiary thereunder Young D. Hahn, father of the insured. [26] Said policy of insurance provided and provides, among other things, that the face "amount of insurance", as therein defined together with any accumulated and post mortem dividends credited to said policy are payable upon legal surrender of said policy at the Home Office of said insurance company, immediately upon receipt at said Home Office of due proof of the death of the insured. Accumulated dividends with interest in the amount of twenty-eight dollars and nineteen cents (\$28.19) and a post mortem dividend in the amount of three dollars and thirty-three cents (\$3.33) together with the return of premium in the amount of one dollar and seventy-two cents (\$1.72) have been credited to said policy of insurance.

V.

On or about March 7, 1944, pursuant to written application therefor, The Prudential Insurance Company of America issued its Juvenile 20-Year Endowment Policy of Insurance No. 12 828 454

upon the life of Herbert H. Hahn, also known as Herbert Huxley Hahn, named as the insured thereunder. Said policy of insurance is in the ultimate face amount of One thousand dollars (\$1,000.00) and when issued and delivered as aforesaid, named and designated as beneficiary thereunder Young D. Hahn, father of the insured. Said policy of insurance provided and provides, among other things, that the face "amount of insurance", as therein defined together with any accumulated and post mortem dividends credited to said policy are payable upon legal surrender of said policy at the Home office of said Insurance Company, immediately upon receipt at the Home Office of due proof of death of the insured. Accumulated dividends with interest in the amount of thirty-six dollars and twenty cents (\$36.20) and a post mortem dividend in the amount of five dollars and fifty-seven cents (\$5.57) have been credited to said policy of insurance.

VI.

On or about March 7, 1944, pursuant to written application [27] therefor, The Prudential Insurance Company of America issued its Juvenile 20-Year Endowment Policy of Insurance No. 12 828 455 upon the life of Herbert H. Hahn, also known as Herbert Huxley Hahn, named as the insured thereunder. Said policy of insurance is in the ultimate face amount of one thousand dollars (\$1,000.00) and when issued and delivered as aforesaid, named and designated as beneficiary thereunder Young D. Hahn, father of the insured. Said policy of insur-

ance provided and provides, among other things, that the face "amount of insurance", as therein defined together with any accumulated and post mortem dividends credited to said policy are payable upon legal surrender of said policy at the Home Office of due proof of the death of the insured. Accumulated dividends with interest in the amount of thirty-six dollars and twenty cents (\$36.20) and a post mortem dividend in the amount of five dollars and fifty-seven cents (\$5.57) have been credited to said policy of insurance.

VII.

On or about March 20, 1944, pursuant to written application therefor, the Prudential Insurance Company of America issued its Juvenile 20-Year Endowment Policy of Insurance No. 12 828 456 upon the life of Herbert H. Hahn, also known as Herbert Huxley Hahn, named as the insured thereunder. Said policy of insurance is in the ultimate face amount of one thousand dollars (\$1,000.00) and when issued and delivered as aforesaid, named and designated as beneficiary thereunder Young D. Hahn, father of the insured. Said policy of insurance provided and provides, among other things, that the face "amount of insurance," as therein defined together with any accumulated and post mortem dividends credited to said policy are payable upon legal surrender of said policy at the Home Office of said insurance Company, immediately upon receipt at said Home Office of due proof of the death of the insured. Accumulated dividends with

interest in the amount of thirty-six [28] dollars and sixteen cents (\$36.16) and a post mortem dividend in the amount of five dollars and fifty-seven cents (\$5.57) have been credited to said policy of insurance.

VIII.

That by virtue of Judgment In Interpleader made and entered November 27, 1953, the Prudential Insurance Company of America has deposited the sum of four thousand one hundred fifty-eight and 51/100 dollars (\$5,158.51) with the Clerk of this Court, said sum being the full proceeds payable by virtue of policies of insurance Nos. D 11 559 107, 12 828 454, 12 828 455 and 12 828 456 upon the life of said Herbert H. Hahn also known as Herbert Huxley Hahn.

IX.

Cross-complainant is informed and believes and upon such information and belief alleges that the insured Herbert H. Hahn, also known as Herbert Huxley Hahn, and the named beneficiary, Young D. Hahn died as a result of a common traffic disaster in Baja, California on the 19th day of April, 1953; that the insured Herbert Huxley Hahn survived the beneficiary Young D. Hahn.

X.

That the estate of Herbert Huxley Hahn is entitled to the proceeds of said policies of insurance on deposit with the Clerk of this court by reason of the beneficiary Young D. Hahn predeceasing said insured Herbert Huxley Hahn.

Wherefore cross-complainant prays that this court adjudge and determine that cross-complainant is entitled to the sum of four thousand, one hundred fifty-eight and 51/100 dollars (\$,159.51) now in the possession of the Clerk of this court representing the proceeds of The Prudential Insurance Company of America policies Nos. D 11 559 107; 12 828 454; 12 828 455 and 12 828 456, upon the life of Herbert H. Hahn also known as Herbert Huxley Hahn, and that the Clerk be ordered and directed to [29] pay the same to cross-complainant; and that cross-complainant be awarded her costs, and for all other and proper relief.

TEMPLETON AND MILLER,

/s/ By HARRY E. TEMPLETON,

Attorneys for Cross-Complainant

Duly Verified.

Affidavit of Service by Mail attached. [31]

[Endorsed]: Filed January 7, 1954.

[Title of District Court and Cause.]

ANSWER OF CROSS-DEFENDANT S. D.
HAHN AS ADMINISTRATOR OF THE
ESTATE OF YOUNG D. HAHN, DE-
CEASED, TO CROSS COMPLAINT IN IN-
TERPLEADER

Comes now Cross Defendant S. D. Hahn as administrator of the Estate of Young D. Hahn, deceased, and answers the Cross Complaint in Inter-

pleader of Sarah E. Padre as Administratrix of the Estate of Herbert Huxley Hahn, Deceased, as follows:

I.

Answering paragraph II of said cross complaint, this cross defendant denies that Herbert Huxley Hahn died on the 19th day of April, 1953, and alleges that Herbert Huxley Hahn died on the 18th day of April, 1953. [32]

II.

Answering paragraph III of said cross complaint, this cross defendant denies that Young D. Hahn died on the 19th day of April, 1953, and alleges that Young D. Hahn died on the 18th day of April, 1953.

III.

Answering paragraph IX of said cross complaint, this cross defendant denies that Herbert H. Hahn, also known as Herbert Huxley Hahn, and Young D. Hahn, or either of them, died on the 19th day of April, 1953, and alleges that Herbert H. Hahn, also known as Herbert Huxley Hahn, and Young D. Hahn, both died on the 18th day of April, 1953, and that Young D. Hahn, the beneficiary, survived the insured, Herbert Huxley Hahn.

IV.

Answering paragraph X of said cross complaint, this cross defendant denies, generally and specifically, each and every allegation contained in said paragraph X.

Wherefore, this cross defendant prays that this

court adjudge and determine that this cross defendant is entitled to the sum of \$4,158.51 now in possession of the Clerk of the above entitled court representing proceeds of the policies of insurance set forth and described in said cross complaint, that the Clerk be ordered and directed to pay the same to cross defendant; that cross defendant be awarded his costs; and all other proper relief; and judgment as prayed for in this cross defendant's cross complaint in interpleader on file herein.

EDWARD CARTER MADDOX,
/s/ By EDWARD CARTER MADDOX,
Attorney for Cross Defendant [33]

Duly Verified.

Affidavit of Service by Mail attached. [34]

[Endorsed]: Filed January 13, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR ORDER CONTINUING DATE OF HEARING

To: S. D. Hahn, as administrator of the Estate of Young D. Hahn, Deceased, and to Edward Carter Maddox, his attorney:

You and Each of You Will Please Take notice that the cross-complainant and cross-defendant Sarah E. Padre, as administratrix of the Estate of Herbert Huxley Hahn, deceased, will on the 25th day of February, 1954, at the hour of 10 o'clock a.m. or as soon thereafter as counsel can be heard,

in the Courtroom of Hon. Benjamin Harrison, Courtroom No. 8, Federal Building, Los Angeles, California, move the court for an order continuing the hearing in the above entitled matter now set for March 1, 1954 at 2 o'clock p.m. to the 15th day of March, 1954, or to such other date as will be convenient to the court's calendar.

Said motion will be based upon this notice of motion, the affidavit of Harry E. Templeton, a copy of which is herewith served upon you, upon all of the records and files in the above entitled action; and upon the further ground that said continuance would further the interest of justice in said action.

Dated this 23rd day of February, 1954.

TEMPLETON AND MILLER,
/s/ By HARRY E. TEMPLETON,

Good Cause Being Shown Therefor, It Is Hereby Ordered that the time for the giving of the above notice of motion is hereby shortened to one day.

Dated February 24, 1954.

/s/ BEN HARRISON,
Judge of U. S. District Court

**AFFIDAVIT IN SUPPORT OF MOTION FOR
CONTINUANCE**

State of California,
County of Los Angeles—ss.

Harry E. Templeton, being first duly sworn, deposes and says:

That he is one of the attorneys for Sarah E. Padre, Administratrix of the Estate of Herbert Huxley Hahn, deceased, cross-defendant and cross-complainant;

That the Court of its own motion ordered the above-entitled matter placed on the calendar on Monday, January 11, 1954, at 10:00 o'clock a.m., pursuant to Rule 16 of the Federal Rules of Civil Procedure, and at that time the parties appeared in the above-entitled matter and the Court set the above case for trial on February 8, 1954, at 2:00 o'clock p.m. and granted unto each party 10 days within which to file documentary evidence upon which he intended to rely;

That thereafter, and within said period affiant presented to the Court duly certified copies of the autopsy reports of the Autopsy Surgeon, Dr. Gustavo Arevalo with respect to Young D. Hahn and Herbert Huxley Hahn, stationed at Mexicali, Mexico; that said reports were offered to show the relative time of death of Young D. Hahn and Herbert Huxley Hahn; that the Court at the time advised the parties that he would rule upon the admissibility of said documents prior to the trial hereof; that the Court did not announce its ruling thereon until the time of the trial on February 8, 1954, at which time the Court sustained the objection of the defendant and cross-complainant Hahn to the introduction of the said autopsy reports and stated in open court that in the interest of justice he would grant a continuance of this

matter to permit the obtaining of further evidence and at the request of the defendant and cross-complainant Hahn, the matter was partially heard and thereafter the Court upon its own motion continued the matter to March 1, 1954, at 2:00 o'clock p.m.; that thereafter affiant went to Mexicali, Mexico, and endeavored to make arrangements for the taking of the deposition of Dr. Gustavo Arevalo and two other witnesses who had been personally present at the scene of the accident, and whose testimony will assist the Court in determining the relative time of death of said decedents which is a material fact in this case; that affiant met with many objections on behalf of the Mexican Officials involved and finally succeeded in arranging for the taking of the deposition of said parties at a date to be fixed.

That affiant immediately endeavored to make arrangements with the deposition reporters acting in Imperial County and ascertained that there were only two reporters available, namely: the regular Court reporters of Imperial County, and that the deposition could not be taken until Saturday, February 27, at 9:30 a.m. That arrangements have been made for the taking of said depositions but that due to the shortness of time it will be practically impossible to have said depositions transcribed and signed by the witnesses in time to be presented in Court on Monday, March 1st, and that in the interest of justice an additional continuance to March 15th is duly requested; that affiant will be ready to

proceed in the trial of the above-entitled matter at that time.

/s/ HARRY E. TEMPLETON

Subscribed and sworn to before me this 23 day of February, 1954.

[Seal] /s/ VERONICA E. PEREZ,
Notary Public in and for said
County and State

[Endorsed]: Filed February 24, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR ORDER RE-OPEN-
ING CASE FOR ADDITIONAL EVIDENCE
OR FOR A NEW TRIAL

To: S. D. Hahn, as administrator of the Estate of
Young D. Hahn, deceased, and to Edward
Carter Maddox, his attorney:

You and Each of You Will Please Take Notice
that the cross-complainant and cross-defendant
Sarah E. Padre, as administratrix of the Estate of
Herbert Huxley Hahn, deceased, will on the 5th day
of April, 1954, at the hour of 11 o'clock a.m. on
said date, or as soon thereafter as counsel can be
heard, in the Courtroom of Hon. Ben Harrison,
Courtroom No. 8, Federal Building, Los Angeles,
California, move the court for an order to re-open
the above entitled action for the admission of ad-
ditional evidence, or for a new trial.

Said motion will be based upon this notice of motion, the affidavits of Harry E. Templeton and Ernestine Thomas, copies of which are herewith served upon you, upon all of the records and files in the above entitled action, and upon the ground of newly discovered evidence, and upon the further ground that the ends of justice will be furthered by the granting of said motion.

Dated this 25th day of March, 1954.

TEMPLETON AND MILLER,
/s/ By HARRY E. TEMPLETON,
Attorneys for Sarah E. Padre

AFFIDAVIT OF HARRY E. TEMPLETON

State of California,
County of Los Angeles—ss.

Harry E. Templeton being first duly sworn, on oath deposes and says:

That he is one of the attorneys for Sarah E. Padre, Administratrix of the Estate of Herbert Huxley Hahn, deceased, cross-defendant and cross-complainant in the above entitled action; that said action was partially heard on the 8th day of February, 1954, and was continued for further hearing and concluded on the 15th day of March, 1954.

That on the 17th day of February, 1954, affiant for the first time learned that Galdino Loza Cuevas had been at the scene of the accident involving Young D. Hahn and Herbert Huxley Hahn, and was the driver of a 1941 Buick automobile, license

plates B-8-826, and resided at 609 Revolucion Avenue, Tijuana, Baja California; that on the 22nd day of February, 1954, when affiant contacted said Galdino Loza Cuevas in Tijuana, Mexico, he stated to affiant that he had driven said Buick automobile from Tijuana to Mexicali for a woman, for whom he had previously driven, but whose name he did not know; that he (Cuevas) did not know the address where said lady resided, but that he could take affiant to her residence; affiant and Cuevas went to the supposed residence of the lady in Tijuana, and were advised upon making inquiry there that the lady who owned the Buick automobile had moved from said residence some two months previously and they thought she had moved to the United States; that she was married to some one by the name of Thomas, whom they had heard worked in one of the ship yards on North Island.

That affiant made inquiry at the police station at Tijuana as to the ownership of said Buick automobile and was advised that said license plates were listed for a 1940 Ford Sedan automobile, licensed to Jose Arreoga.

That affiant then made inquiry at the United States Immigration authorities at San Ysidro, just across the border from Tijuana as to whether or not a Mrs. Thomas had immigrated to the United States within the past two months, and was advised by the Immigration authorities that they had not since 1951 kept any alphabetical record of the immigrants into the United States and unless affiant could give

them the maiden name of the lady in question they could give affiant no assistance whatsoever; affiant did not know whether Thomas was the given name or the surname of the husband of the lady in question; that affiant requested Mr. Cuevas to keep a look out for the lady in question, and on March 14, 1954, at or about 9:30 p.m. while affiant was driving Galdino Loza Cuevas from Tijuana to Los Angeles to be a witness herein on March 15, 1954, he (Cuevas) stated to affiant that he had just found out that Mrs. Thomas, the lady whose car he was driving on the 18th day of April, 1953, was named Ernestine, and that she was living somewhere in the San Diego area, but he did not know her address; that because the hearing of this action was set for 2:00 p.m. on the 15th day of March, 1954, there was not then sufficient time for your affiant to make any effort to locate said witness prior to said hearing.

That on the 17th day of March, 1954, affiant enlisted the aid of attorney Robert A. Oakes of San Diego, in an endeavor to locate Mrs. Thomas; affiant advised Mr. Oakes that he thought that Ernestine Thomas' husband was employed in one of the ship yards on North Island, and if possible, to contact the ship yards and locate the address of a Mr. Thomas whose wife's name was Ernestine; that on March 19, 1954, Mr. Oakes called affiant and stated that he had been unable to locate the lady in question and recommended that affiant employ a R. S. Gordon, a private investigator to personally go over to the ship yards in an endeavor to locate the lady in question; that affiant, through said

Robert A. Oakes, employed said R. S. Gordon to make said investigation; that in the late afternoon of March 19, 1954, Mr. Gordon called and advised affiant that he had gone to the various ship yards on North Island and that by personally running down their records he had located the address of Mrs. Ernestine Thomas; that affiant went to San Diego County on March 20, 1954, and talked with Mrs. Ernestine Thomas, and on Sunday, March 21, 1954, Mrs. Thomas discussed the facts of the accident in question with affiant and affiant prepared an affidavit with respect to said facts for her signature; that said Ernestine Thomas then went before Henry Brulay, a Notary Public in and for the County of San Diego, State of California, and Henry Brulay personally read said affidavit to Mrs. Thomas in Spanish and she advised him that the contents thereof were true and she then signed and swore to said affidavit. That said affidavit of Ernestine Thomas is attached to this Notice of Motion.

Wherefore affiant prays that the above-entitled matter be re-opened for the taking of further and additional evidence, or that a new trial be granted.

/s/ HARRY E. TEMPLETON,

Subscribed and sworn to before me this 25 day of March, 1954.

[Seal] /s/ VERONICA E. PEREZ,

Notary Public in and for said
County and State

AFFIDAVIT OF ERNESTINE THOMAS

State of California,
County of San Diego—ss.

Ernestine Thomas, being duly sworn, deposes and says:

That on April 18, 1953, I employed Goldino Loza Cuevas, a taxi driver of TiaJuana, Baja California, Mexico to drive my Buick car from Tijuana to Mexicali. We left Tijuana about nine p.m. and made one of several stops, at Rumarosa. About forty-five minutes after leaving Rumarosa, we came to the scene of an accident in which a Nash sedan was involved with a piece of construction machinery. Mr. Cuevas and I got out of my car and went to the right side of the car. The window was down or broken and the body of a man was in the right front seat. He was making no sound and as near as I could tell, he was dead. He did not appear to be breathing. I then went to the other side of the Nash, and assisted the lady who was lying on the pavement next to the drivers seat. She was moaning that she was going to die. The policeman took the little boy, about 12 or 13 years old out of the Nash and handed him to Mr. Cuevas, in his outstretched arms. Mr. Cuevas put the boy in the back seat of my car, as I held the door open. The boy was breathing, in halting gasps. We followed the Mexicali local police car into Mexicali. I leaned over the back seat of the car, and put my hand over onto the boy, to keep him from falling off of the seat. I could feel him breathing in a labored manner, and

also could hear his slight gasps for breath. About ten minutes before we arrived in Mexicali, the boy died. The police did not arrive at the scene of the accident until about an hour after we first stopped, and it took us about thirty to forty minutes, after we left the scene of the accident until we got to Mexicali. This was about two o'clock in the morning. No ambulance ever came to the scene of the accident while I was there.

/s/ ERNESTINE THOMAS

Subscribed and sworn to before me this 21st day of March, 1954.

[Seal] /s/ HENRY BRULAY,
Notary Public in and for said
State

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 26, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for hearing on the cross-complaints of S. D. Hahn as administrator of the Estate of Young D. Hahn, deceased and Sarah E. Padre, as administratrix of the Estate of Herbert Huxley Hahn, deceased, on the 8th day of February, 1954 and was partially

heard on said date and continued for further hearing and partially heard on the 15th day of March, 1954 and continued for further hearing and concluded on the 16th day of August, 1954, before the Hon. Judge Ben Harrison, Judge presiding, [35] a jury trial having been expressly waived; Templeton and Miller by Harry E. Templeton appearing as counsel for Sarah E. Padre, administratrix of the Estate of Herbert Huxley Hahn, deceased, and Edward Carter Maddox appearing as counsel for S. D. Hahn, as administrator of the Estate of Young D. Hahn on the 8th day of February, 1954 and the 15th day of March, 1954, and Edward Carter Maddox and Isaac Pacht appearing as counsel for S. D. Hahn, as administrator of the Estate of Young D. Hahn, deceased on the 16th day of August, 1954; and oral and documentary evidence having been introduced by the respective parties, and the Court being fully advised in the premises and said matter having been submitted to the court for its decision, the court now makes its findings of fact and conclusions of law as follows:

Findings of Fact

I.

That each and all of the allegations set forth in paragraphs I, IV, V, VI, VII, VIII and X of Sarah E. Padre's cross-complaint are true.

II.

That each and all of the allegations set forth in

paragraphs I, IV, V, VI, VII and VIII of S. D. Hahn's cross-complaint are true.

III.

That it is true that said Herbert H. Hahn also known as Herbert Huxley Hahn and Young D. Hahn died as the result of a collision between a Nash automobile, in which they were riding, and a concrete mixer, on the Tijuana-Mexicali Highway between Tijuana and Mexicali, in Baja California.

IV.

That it is not true that Herbert Huxley Hahn died on the 18th day of April, 1953, but on the contrary it is true that said Herbert Huxley Hahn died between 1:30 a.m. and 1:50 a.m. on the [36] 19th day of April, 1953 in a Buick automobile which was being driven by Galdino Loza Cuevas from the scene of the accident to the hospital in Mexicali; that said Herbert Huxley Hahn died while said automobile was enroute to the hospital in Mexicali, Baja California, and his body was thereafter taken to the hospital in Mexicali.

That it is true that at the time of his death said Herbert Huxley Hahn was a resident of the County of San Bernardino; that thereafter and on the 12th day of June, 1953, Sarah E. Padre was appointed administratrix of the Estate of said Herbert Huxley Hahn, deceased; that thereafter said Sarah E. Padre, qualified as such administratrix and ever since said time she has been and now is the duly

appointed, qualified and acting administratrix of the Estate of Herbert Huxley Hahn, deceased.

V.

That it is not true that Young D. Hahn died on the 19th day of April, 1953, but on the contrary it is true that Young D. Hahn died intestate on the 18th day of April, 1953, shortly before midnight, and that thereafter his body was taken direct to the morgue at Mexicali, Baja California.

That it is true that said Young D. Hahn was at said time a resident of the County of Los Angeles, State of California, that subsequent thereto on the 14th day of May, 1953, S. D. Hahn was appointed as administrator of the Estate of Young D. Hahn, deceased, duly qualified as such and has ever since acted as such administrator.

VI.

That it is not true that the Estate of Young D. Hahn is entitled to the proceeds of said policies of insurance on deposit with the Clerk of this court by reason of his being the duly named and designated beneficiary thereunder.

Conclusions of Law

1. That Young D. Hahn predeceased Herbert H. Hahn, also [37] known as Herbert Huxley Hahn.
2. That the estate of Herbert Huxley Hahn is

entitled to the proceeds of the subject insurance policies.

Dated this 30 day of August, 1954.

/s/ BEN HARRISON,
Judge Presiding [38]

Acknowledgment of Service attached. [39]

[Endorsed]: Filed August 30, 1954.

In the United States District Court, Southern District of California, Central Division

No. 15951-BH

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a corporation, Plaintiff,

vs.

SARAH E. PADRE, etc., et al., Defendants.

S. D. HAHN, etc., Cross-Complainant and Cross-Defendant,

vs.

SARAH E. PADRE, etc., Cross-Defendant and Cross-Complainant.

JUDGMENT

The above entitled cause came on regularly for hearing on the cross-complaints of S. D. Hahn as administrator of the Estate of Young D. Hahn, deceased and Sarah E. Padre, as administratrix of

the Estate of Herbert Huxley Hahn, deceased, on the 8th day February, 1954 and was partially heard on said date and continued for further hearing and partially heard on the 15th day of March, 1954 and continued for further hearing and concluded on the 16th [40] day of August, 1954 before the Hon. Judge Ben Harrison, Judge presiding, a jury trial having been expressly waived; Templeton and Miller by Harry E. Templeton appearing as counsel for Sarah E. Padre, administratrix of the Estate of Herbert Huxley Hahn, deceased, and Edward Carter Maddox appearing as counsel for S. D. Hahn, as administrator of the Estate of Young D. Hahn on the 8th day of February, 1954 and the 15th day of March, 1954 and Edward Carter Maddox and Isaac Pacht appearing as counsel for S. D. Hahn, as administrator of the Estate of Young D. Hahn, deceased on the 16th day of August, 1954; and oral and documentary evidence having been introduced by the respective parties and the court being fully advised in the premises and having filed herein its findings of fact and conclusions of law, Now Therefore,

It Is Hereby Ordered, Adjudged and Decreed:

I.

That the cross-complainant Sarah E. Padre, as administratrix of the Estate of Herbert Huxley Hahn, deceased have judgment for all remaining proceeds of policies numbered 11 559 107; 12 828 454; 12 828 455 and 12 828 456, issued by the Prudential Insurance Company of America, total-

ing the sum of thirty-eight hundred twenty-nine and 11/100 dollars (\$3,829.11), which sum is presently on deposit with the Clerk of the above entitled court, and the Clerk of said court is ordered and directed to deliver said sum to Sarah E. Padre, as administratrix of the Estate of Herbert Huxley Hahn, deceased, and to take her receipt therefor.

II.

That the cross-complainant Sarah E. Padre, as administratrix of the Estate of Herbert Huxley Hahn, deceased, have and recover from the cross-defendant S. D. Hahn, as administrator of the Estate of Young D. Hahn, deceased, her costs of suit herein, taxed at \$207.85. [41]

Dated this 30 day of August, 1954.

/s/ BEN HARRISON,
Judge Presiding [42]

Acknowledgment of Service attached. [43]

[Endorsed]: Filed and Entered August 30, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Clerk of the above entitled Court, and to Sarah E. Padre, Cross Complainant and Cross Defendant, and to Templeton and Miller, attorneys for Sarah E. Padre:

Take Notice that cross complainant and cross

defendant S. D. Hahn, as administrator of the Estate of Young D. Hahn, Deceased, in the above entitled action hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the judgment [44] therein rendered and entered in the said United States District Court, Southern District of California, Central Division, on the 30th day of August, 1954, in favor of the cross complainant and cross defendant Sarah E. Padre as administratrix of the Estate of Herbert Huxley Hahn, Deceased, and against cross complainant and cross defendant S. D. Hahn, as administrator of the Estate of Young D. Hahn, Deceased, and from the whole of said judgment.

Dated this 29th day of September, 1954.

EDWARD CARTER MADDUX,
/s/ EDWARD CARTER MADDUX,
Attorney for S. D. Hahn [45]

Affidavit of Service by Mail attached. [46]

[Endorsed]: Filed September 29, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 53, inclusive, contain the original Complaint; Judgment in Interpleader; Two Cross Complaints in Interpleader; Two Answers to Cross-Complaints in Interpleader; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Designation of Record on Appeal and two Orders Extending Time to Docket Appeal which, together with the Reporter's Transcript of Proceedings and the original exhibits constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 23rd day of December, A.D. 1954.

[Seal]

EDMUND L. SMITH,
Clerk

In the United States District Court, Southern District of California, Central Division

No. 15,951-BH-Civil

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a corporation, Plaintiff,

vs.

SARAH E. PADRE, as Administratrix of the
Estate of Herbert Huxley Hahn, Deceased, S.
D. HAHN, as Administrator of the Estate of
Young D. Hahn, Deceased, et al., Defendants.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Monday, Feb. 8, 1954

Honorable Ben Harrison, Judge presiding.

Appearances: For Plaintiff: Messrs. Adams, Duque & Hazeltine (no appearance). For Defendant Sarah E. Padre, etc.: Messrs. Templeton & Miller by Harry E. Templeton, Esq. For Defendant S. D. Hahn, etc.: Edward Carter Maddox, Esq. [1*]

The Court: You may proceed.

The Clerk: The Prudential Insurance Company of America versus Sarah E. Padre and others, No. 15,951-BH Civil.

Mr. Templeton: Ready for the defendant Sarah Padre, your Honor.

Mr. Maddox: Ready for the defendant Hahn.

The Court: Counsel, I was thinking last week

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

I probably should have called you in for a conference.

I feel that the certificates of death are admissible.

It also seems to me that inasmuch as there is sufficient money involved the parties should be able to get some definite proof from somebody other than the coroner who held an inquest and fixed the time of death. I question whether that is sufficient upon which to base a finding of the time of death.

Mr. Maddox: I certainly do too, your Honor. That is my position. I think of course it is up to each person to carry the burden of proof and I am prepared to present my evidence.

The Court: I am not going to take advantage of anybody on account of that situation. Whom do you represent?

Mr. Maddox: I represent the defendant S. D. Hahn, the estate of the father. [3]

The Court: Isn't there a presumption that the insured died first?

Mr. Maddox: No. California adopted the uniform simultaneous death and there is no presumption as to the order of death.

The Court: I thought under the Code there was a section which specifically provides that there is a presumption that the insured died before the beneficiary.

Mr. Maddox: There is one subdivision of the probate code which covers that and it says substantially that unless there is sufficient evidence to the contrary then it will be presumed that death was simultaneous. Then if the death is simultaneous,

that is between the beneficiary and the insured, each one's interest in the policy goes as though he had survived. In other words, the insured, what he had would go to his estate.

That is the way it would happen unless there is other evidence to the contrary.

The Court: It seems to me that I probably should have advised counsel as to my feelings. I don't want to take advantage of either side.

It seems to me there must be some witnesses upon whose testimony the coroner issued a certificate. That testimony must be available. It isn't very far from here.

Mr. Templeton: Your Honor, when I found out the other [4] day about this I called the clerk and I did ascertain—that was Friday—I did ascertain that the court was not going to admit the coroner's certificate. I had reliance upon that. Then of course it was impossible for me at that time to get any witnesses up here from Mexico, at that late stage and consequently I would like to take the deposition of the coroner down there.

The Court: The coroner made a certificate but there apparently was somebody at the scene of this accident almost at the time it happened.

Mr. Templeton: Well, it is very hard to get any testimony out of Mexico.

The Court: It seems to me the family should be able to settle their differences in this case and apportion the money among them rather than have it go all one way or the other. But apparently they want it litigated.

I have read the coroner's autopsy report and I have read the certificate of death, but there is nothing upon which I can act.

I question whether a certificate of death would have the effect that you expect of it. It seems to me there must have been somebody at the scene of the accident before either one of the parties died because the report shows a difference of an hour or half hour between them.

Mr. Templeton: The autopsy surgeon reported three [5] hours.

The Court: Weren't they taken to a hospital?

Mr. Templeton: They were taken to the hospital but I don't believe that both of them got to the hospital before they died.

The Court: There must be some evidence available with reference to that, counsel. There must be some evidence as to that. The certificate of death may be of value but I question it.

Mr. Templeton: You mean the autopsy report or the certificate of death?

The Court: The certificate of death because the coroner had nothing to base it upon.

Mr. Templeton: The certificate of death merely establishes the date of death.

The Court: It attempts to establish the time but I question whether he can fix the time of death.

Mr. Templeton: Well, the autopsy report attempts to fix the time. The certificate is merely the date.

The Court: There must be some information available from which they got that date. Either a

witness should be brought in or there should be depositions taken.

Mr. Templeton: I would like to take the deposition of the people at the hospital.

The Court: It seems to me that information should be [6] obtained.

Mr. Maddox: May I give you my position on this? The simultaneous death act only applies when there is no such evidence by witnesses.

Now, Mr. Templeton's contention is that the son survived the father. Now, he has the burden of proving that because that is the contention that he makes in his pleadings.

And as to the admissibility of the autopsy report, there is California law on whether or not that type of evidence is admissible.

The Court: I am not arguing about the autopsy report. What I am concerned with is the certificate of death.

Mr. Maddox: The certificate of death? All right, it is up to him to bring into court enough and sufficient evidence to meet his burden. It is up to me to bring into court sufficient evidence to meet my burden and I have attempted to do that and I am prepared to proceed today.

We have gone to considerable trouble to get ready for this trial today and to bring before this court the evidence that we think the court needs in order to reach a decision.

The Court: I am willing to hear your evidence, but I am going to give opposing counsel an opportunity to establish the facts by somebody that was

at the scene of the accident or shortly thereafter.

Where did the accident happen? Was it on the main [7] highway?

Mr. Templeton: On the main highway No. 2, between Mexicali and Tijuana.

Mr. Maddox: Also I think if we will ask Mr. Templeton he will tell us that he went down to Mexico immediately after this accident and made a personal investigation and he has known that these issues were coming up.

We have three matters pending which are all depending upon the settlement of this main issue, the order of death.

Now, Mr. Templeton has been down there. I don't think he will deny that we have been prepared in this case for some time. We have discussed the possibility of settlement. We were unable to arrive at a settlement.

Now today we are in court and we are ready to go ahead. I don't think that—I don't know on just what grounds a continuance might be granted. I don't think Mr. Templeton is even asking for one.

The Court: You don't have to worry about the grounds. The court will find it is on the grounds of public interest and in the interest of justice.

Mr. Maddox: I know that the court certainly has that power, your Honor, but I wonder if he really is being taken advantage of or is it unfair? He has had all this time and he has been down there.

The Court: I misled him at the pretrial. I told him I [8] would give him a definite ruling on that

and I didn't have an opportunity to tell him how I felt about the certificate of death.

Now, I might go ahead and accept that certificate of death. I don't know whether it would be error or not.

Mr. Maddox: Well, I think the certificate is admissible to determine the fact of the deaths and the date of the deaths, but to determine priority is something else. I do not think it is admissible for that purpose.

The Court: I am frank to say I felt the coroner was in no position to make that statement as to the time of death. There was nothing to show that he had any information on which to base that. I read the autopsy report and there is nothing to show he had any information before him that indicated the time of death.

It may be that I will have to hold that they were simultaneous. I don't know. But if there was a lapse of three hours between them I think it would be unfair for me to hold simultaneous death.

Mr. Maddox: I think so, too. We all want to get at the facts. As I said before, I have evidence available, we have witnesses available who were there at the scene of the accident and who are here in court today. They are here from Mexicali.

The Court: Let us take their testimony, counsel, and [9] then they won't have to come back. And if counsel has any additional evidence that he wants to submit I will give him an opportunity to do so.

Suppose we take the testimony of those witnesses who are here from a distance and make a record

of that and I will have it before me. Maybe they can fix the time of death. Maybe they can show it is simultaneous. We are not trying to determine these things on mere technicalities. We want to determine what is the truth if we can.

However, I might say that this seems to me a case where the parties should have gotten together. I don't think either one of them should be in a position where they might lose the entire \$4,000.

Mr. Templeton: Your Honor, in this case, first, I want to answer counsel's statement. I did go down to Mexicali shortly after this accident. It was within a couple of weeks, I think. I don't remember exactly.

I went down there. I located the autopsy surgeon. I talked to him and he told me definitely the autopsy report would establish that.

I arranged to get certified copies of that document. That is what I presented here, and which I was relying upon as being sufficient to establish the order of death.

I do, in the interest of justice, ask leave to take the depositions of some witnesses down there because as I say at the time when we came here on the preliminary trial I thought I would have sufficient time after the court's ruling in order to get such evidence as I would need if the court wasn't going to admit that.

The Court: That is the reason I am making this statement now. I don't want to take undue advantage of counsel. I think if we have any witnesses here who were at the scene of the accident or

shortly thereafter, particularly if they came from any distance, so they will not have to come back again, we should take their testimony today. Let us see if we can't ascertain what the facts are, counsel.

Mr. Maddox: All right. Will you take the stand, Mr. Hahn?

Your Honor, I would like to say this. We have agreed that any documents we have would be presented to the court beforehand. The only thing I have is the original of the insurance policies and I have photostatic copies of the policies. I don't know if the court—— [11]

The Court: As I understand, the only dispute here and the only thing for the court to determine is priority of death, whether death was simultaneous or whether there was a difference between them as to the time of death.

Mr. Maddox: That is the only issue.

Mr. Templeton: The only issue is priority of death.

Mr. Maddox: I have an interpreter.

The Court: The interpreter will be sworn.

(J. Duran was sworn to interpret from the Spanish language into the English language and from English into Spanish.)

Mr. Maddox: I will call Mr. Luna.

MACARIO LUNA-RAMIREZ

called as a witness by the defendant S. D. Hahn, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Macario Luna-Ramirez.

Direct Examination

Q. (By Mr. Maddox): What is your occupation, Mr. Luna?

A. I want to know whether at the present time or before because at the present time I am on leave and I have no job at the present time. [12]

Q. What was your occupation on the 18th of April, 1953?

A. Chief of the surveillance department of the Federal Department of Highways.

Q. In what country? A. Mexico.

Q. How long have you held that position?

A. 13 years.

Q. In connection with this position did you ever have any training in first aid? A. Yes.

Q. In connection with this position was it your duty to investigate highway accidents?

A. Yes, that is my work.

Q. Now, did you happen to observe an accident on the highway a few miles from Mexicali on the night of the 18th of April, 1953? A. Yes.

The Court: Ask him if he saw the accident.

The Witness: No, at the time the accident happened, no.

(Testimony of Macario Luna-Ramirez.)

Q. (By Mr. Maddox): Was anyone with you when you came upon the scene of the accident?

A. Yes.

Q. Who was that person?

A. Mr. Bello. [13]

Q. Is he the man who is in the courtroom here today? A. Yes.

Q. Jose Bello? A. Yes.

Q. Did you get any report of this accident before visiting the scene? A. Yes.

Q. From whom did you receive this report?

A. From the rural police.

Q. Approximately what time of the day was it when you received the report?

A. At 11:30 or 11:35 at night.

Q. And what did you do after you received this report?

A. Went to the scene of the accident immediately.

Q. Did you immediately go to the scene of the accident?

A. Yes; because we were traveling. We were on the highway, watching the highway and we went there immediately.

Q. Were you in an automobile?

A. Yes, sir.

Q. Approximately what time did you arrive at the scene of the accident?

A. 10 minutes later at the most.

Q. What did you see when you arrived at the scene of the accident?

(Testimony of Macario Luna-Ramirez.)

A. There was a cement or pavement mixture machine [14] standing on the road on one side of the road and an automobile that hit against the concrete mixer on the right side of the automobile.

Q. Were there any persons present at the scene of the accident?

A. There was a woman lying on the ground on the side of the driver's wheel and inside of the car on the front, on the right side, there was a man pressed right against the front seat and the instrument panel of the car. He was breathing with difficulty.

Q. Was anyone in the rear seat of the car?

A. Yes. On the rear seat there was a boy, a minor. I started to get the things out of the back of the car to see if the child was alive.

Q. Did you make any effort to determine whether or not the boy was alive?

A. Yes, I did.

Q. And what effort did you make?

A. That the child was dead—that he had received a—he had been stricken with something that had produced a hemorrhage.

Mr. Templeton: If the court please, I want to move that he be stricken as an opinion of the witness. There is no foundation laid yet to show that he is qualified as a medical expert. [15]

The Court: Oh, I think he has stated his experi-

(Testimony of Macario Luna-Ramirez.)

ence on the highway. He can testify whether a person is dead or alive. The objection is overruled.

Q. (By Mr. Maddox): Did you observe whether or not the boy was breathing?

A. Yes, I did, but he was not breathing. He had no pulse at all. He was dead.

The Court: Did you feel his pulse?

The Witness: Yes.

Q. (By Mr. Maddox): Now, you said that the man on the front seat was breathing with difficulty.

A. Yes; he was breathing with a great deal of difficulty on account of the position which he was in.

Q. Did you feel his pulse?

A. Yes. And aside from the pulse I could hear him breathing.

Q. Were the bodies later—strike that.

How long did you remain at the scene of the accident?

A. I remained there until help came for the lady and the transportation to the hospital at Mexicali. It may have been around a half hour.

Q. Did the man in the front seat appear to be living during all of that time?

A. Yes, he continued breathing for about 10 minutes longer. [16]

Q. Was he alive when the ambulance came?

A. No, he had died already.

Q. Describe the position in which the boy was sitting in the rear seat.

A. He was not exactly sitting up. He was more or less lying down with his head against the floor

(Testimony of Macario Luna-Ramirez.)

of the car. It appeared—it seemed that the child had been lying on the rear seat, lying down on the rear seat.

Mr. Templeton: I move that be stricken.

The Court: That will be stricken.

Q. (By Mr. Maddox): Was there anything in the rear seat with the child?

A. Yes, some fishing tackle.

The Court: Was there any person in the rear seat?

The Witness: No. There were some boxes made out of galvanized—laminated iron and on account of the impact the things that were in the back of the car with the child were thrown forward.

Mr. Templeton: I move that be stricken as purely an opinion of the witness.

The Court: Well, what materiality is it, counsel? The only thing I am interested in in this witness is that he testified when he examined the boy he had no pulse and the man was still breathing.

I don't know what further questions you can ask. [17]

Mr. Maddox: All right.

The Court: That is the only issue.

Mr. Maddox: I have no further questions.

Cross Examination

Q. (By Mr. Templeton): Have you at any time ever had any medical training? A. No.

Q. How long have you been with the highway department, the Mexican Highway Department?

(Testimony of Macario Luna-Ramirez.)

A. 13 years.

Q. Prior to that time what was your occupation?

Mr. Maddox: Object to that as being irrelevant.

The Court: Objection overruled.

The Witness: I was employed by the Minister of Communications and Public Works.

Q. (By Mr. Templeton): Have you ever taken any courses——

The Court: I understand this witness's testimony is that he had worked on highway investigations and that is all the medical training he has had. Ask him if that isn't true—that that is all the experience he has had.

The Witness: Employees like ourselves, must have had—we must have first aid training.

The Court: How many accidents have you investigated?

The Witness: Many, many. I do not recall how many. It is in the entire Republic—not only this place. [18]

The Court: How far east of Tijuana was it?

The Witness: I don't remember exactly what distance it was but it seems to me that it was kilometer 160. 160 kilometers from Tijuana—or less. I don't remember exactly.

Q. (By Mr. Templeton): How far was it from Mexicali? A. 30 kilometers.

Q. Where were you at the time you received the call?

(Testimony of Macario Luna-Ramirez.)

A. I was at a place called Colonia Sargosa, which is 12 kilometers from Mexicali.

The Court: How far was it from where you were to the place of the accident?

The Witness: About 18 kilometers.

The Court: How far is that in miles?

The Interpreter: 100 kilometers equals 60 miles.

The Court: Go ahead.

Q. (By Mr. Templeton): Mr. Luna, you said that you received a call from the rural police, is that correct?

A. While patrolling the highway the car of the rural police stopped us on the highway to notify us about that.

Q. Do you know who was in the rural police car?

A. It was an agent of the rural police who is stationed at that place but I do not remember his name.

Q. What kind of car was he in?

A. In a Willys station wagon—a type of station wagon. [19]

Q. Was it a regular police car? A. Yes.

Q. How many men were in that car?

A. Only that agent.

Q. Were you acquainted with him prior to this time? A. Yes.

Q. What was his name?

A. I don't remember.

Q. How long had you known him?

(Testimony of Macario Luna-Ramirez.)

A. The time that I have been in Mexicali. About six or five years.

Q. Do you know where he resides—where he lives? A. At the Progreso Colonia.

Q. Where is that?

A. On the highway at 18 kilometers from Mexicali.

Q. Is that Progreso Colonia—is that in—Colonia Sargosa? Was this Progreso Colonia in the town of Saragosa Colonia?

A. No, they are two different towns. It belongs in the jurisdiction of Saragosa but Colonia Progreso is about five kilometers away.

Q. Which direction? Toward Mexicali, isn't it?

A. Toward Mexicali, yes.

Q. Was this agent that you met in the Willys station wagon the only rural policeman in that town? [20]

A. Well, that agent belongs to the—that agent is of the rural police. He belongs to the rural police and is of the sub-delegation of the Government of Colonia Progreso.

Q. He is from what? A. Sub-delegation.

Q. Will you describe this man for me?

A. He is tall and heavy set.

Q. How old?

A. He may be around 45 years of age.

Q. Does he wear a mustache? A. No.

Q. How heavy would you say he is?

A. He may weigh in pounds—well, I can better

(Testimony of Macario Luna-Ramirez.)

figure it out in kilograms. About 85 or 90 kilograms.

Q. What would be his height, approximately?

The Court: Now, counsel, I am not going to permit this. This is not proper cross examination.

Mr. Templeton: Your Honor, the sole purpose of this is—he has talked to a man who apparently was at the scene of the accident before he was.

The Court: But at the same time I am not giving you an opportunity for discovery. You had that opportunity before trial. I have given you every possible opportunity to prove your case but I am not going to take up all afternoon while you find out if this fellow paints his toenails. [21]

Mr. Templeton: I am simply trying to locate him.

The Court: Do you know where he lives?

The Witness: Yes, at Colonia Progreso.

The Court: That is a small place. You should be able to locate him.

The Witness: There are no streets, no particular street there. It is just a small town. It is an agricultural town.

Q. (By Mr. Templeton): Mr. Luna, did you make a report of this accident to your superiors?

A. A report is made of all accidents.

Q. And in this report did you give them all the details of the accident such as you have testified to here today?

Mr. Maddox: Just a minute. I object to that. I

(Testimony of Macario Luna-Ramirez.)

think that the report itself would be the best evidence of its contents.

The Court: I think that is correct.

Mr. Templeton: I am laying a foundation for that, your Honor. I have the report here. I want to ask him if he made it—if the report that he made would cover all of the facts.

The Court: That is too general. Show him the report.

Q. (By Mr. Templeton): Mr. Luna, I show you a report No. 34 and ask you if you will read that over and tell me whether or not that is the report of the accident as you [22] made it to your superior officer? A. Yes.

The Court: Do you have a translation?

Mr. Templeton: I have a translation, your Honor.

Mr. Maddox: I object to that document as being irrelevant. It is not inconsistent at all with what he has said here.

The Court: I think counsel has a right to impeach the witness.

Mr. Maddox: Only by an inconsistent statement. This is not inconsistent one bit. I don't think he can point out any inconsistency.

The Court: This isn't a report made out by him, is it?

Mr. Templeton: Yes, your Honor, it appears to be.

The Court: Where?

Mr. Templeton: His name appears on it. This is

(Testimony of Macario Luna-Ramirez.)

a certified copy of the report that shows it is signed by this man. It is on the second page.

The Court: Where is it signed by him?

Mr. Templeton: Right here.

The Court: Will you show me where it appears?

Mr. Templeton: It appears on page 3 of the translation at this point.

The Court: This man's name is Ramirez. This isn't signed by him. [23]

Mr. Templeton: This is a certified copy.

The Court: This can't be used to impeach him. It is something written by somebody else.

Mr. Templeton: Your Honor, may I examine the witness further on this?

The Court: Yes.

Q. (By Mr. Templeton): Mr. Luna, this is a copy of the report which you made to your superior officer? A. Yes.

Q. And up to the point where I am now showing you that was signed by you?

A. Yes, sir; and Mr. Serta (phonetic).

Q. What is his position?

A. He has the same position that I had at that time.

Q. And this is an exact copy of the report which you made to your superior? A. Yes, sir.

Mr. Maddox: I object to that as calling for a conclusion on the part of the witness.

The Court: If he can answer it.

The Witness: Yes.

(Testimony of Macario Luna-Ramirez.)

Mr. Maddox: I would like to take him on voir dire.

The Court: I don't see where there is anything in there that conflicts with your theory of the case, counsel.

Mr. Templeton: The only thing is, your Honor, that it [24] does show that at the time he makes no reference in his report to the fact that either of the parties was alive when he got there.

The Court: He didn't say one way or the other. I don't think that impeaches his testimony in any way, shape or form, counsel.

Q. (By Mr. Templeton): Mr. Luna, was it a practice of yours in making reports to report all of the facts in your investigation?

A. The report that is made is a concrete report. It isn't given with many details because it would be a very long report then.

Q. Why did you not, Mr. Luna, report to your superior with respect to the fact that you found one of the parties alive?

Mr. Maddox: Objected to as being argumentative and irrelevant?

The Court: Let him answer the question.

The Witness: A report is made in that way if the person or the persons arrive at the hospital alive but when do they not arrive at the hospital alive that is not put in the report.

Q. (By Mr. Templeton): Mr. Luna, did you go to the hospital with the two bodies? A. No.

Q. As a matter of fact they were placed in the

(Testimony of Macario Luna-Ramirez.)

ambulance [25] and you didn't see them from that time on. A. No.

Mr. Templeton: If the court please, I offer this in evidence.

The Court: It will be admitted.

The Clerk: What is it?

Mr. Templeton: It is a certified copy of this officer's report.

The Court: The only thing is, counsel, that reports them both dead. That doesn't substantiate your theory at all.

Mr. Templeton: I know, your Honor, but in my opinion——

The Court: I don't care what your opinion is about the matter. I want to know what the evidence is.

Mr. Templeton: The reason I am offering it is I feel that it shows that if the man had been alive at the time it should have been in the report. It goes to the weight of it, that is true.

The Court: Any further questions?

Mr. Templeton: May this be received?

The Court: Yes.

The Clerk: Exhibit A.

(The document referred to, and marked Defendants' Exhibit A, was received in evidence.)

Q. (By Mr. Templeton): Mr. Luna, have you received any [26] money for your coming up here to testify? A. The expenses.

Q. How much did you receive?

A. I haven't received anything yet.

(Testimony of Macario Luna-Ramirez.)

Q. Did you receive some money some months ago at the time when you were questioned in regard to this? A. No.

Mr. Maddox: Just a minute. I object to that as being vague and indefinite as to time.

The Court: Objection overruled.

The Witness: No.

Q. (By Mr. Templeton): Have you been promised any given sum of money for testifying—coming up here and testifying?

A. No, I have not. I have only been taking advantage of the leave that I have now to come here and to visit around Los Angeles—leave of absence.

Q. Have you been promised any amount of money for coming here and testifying today?

A. No.

Mr. Templeton: That is all.

The Court: That is all.

Mr. Maddox: I would like to ask some more questions. [27]

Redirect Examination

Q. (By Mr. Maddox): Calling your attention to the report which you signed, Mr. Luna, Exhibit A, you mentioned the names of two people as being found in the car. A. Yes.

Q. Are those the two people you found in the car on the highway? A. Yes.

Mr. Maddox: No further questions.

Mr. Templeton: What were their names?

The Witness: Young D. Hahn and Herbert Huxley Hahn.

(Testimony of Macario Luna-Ramirez.)

Mr. Templeton: How do you know their names?

The Witness: When we arrived at the scene of the accident the persons that were involved in the accident have to be identified with their papers or documents.

Mr. Templeton: And you identified them from documents on the parties?

The Witness: Yes, on the clothing.

Mr. Templeton: That is all.

The Court: Call your next witness.

Mr. Maddox: Mr. Bello. [28]

JOSE BELLO

called as a witness by the defendant S. D. Hahn, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Jose Bello.

The Court: You speak English?

The Witness: No.

Direct Examination

Q. (By Mr. Maddox): Mr. Bello, what was your occupation on the 18th of April, 1953?

A. Employed by the Federal Office of Transis and Assistant to the Federal Police.

Q. Do you still hold that position?

A. Yes.

Q. Calling your attention to the night of April 18, 1953, were you riding in a car with Mr. Luna that night?

A. Yes.

(Testimony of Jose Bello.)

Q. Do you recall coming upon the scene of an accident on the highway leading from Mexicali?

A. Yes, together with Mr. Luna.

Q. About what time was it when you arrived at the scene?

A. Between 11:30 or 11:40 or thereabouts.

Q. Did you find an automobile there?

A. Yes. [29]

Q. And did you find any person in the car?

A. Yes.

Q. Tell us what you observed as to the condition of the person on the front seat of the car.

A. He was pressed between the front seat and the panel instrument in the front of the car.

Q. Did he appear to be alive or dead?

A. He appeared alive.

Q. What did you observe that makes you say he was alive?

A. He was breathing with difficulty, very badly.

Q. Did you see anyone on the rear seat of the car?

A. Yes, a child.

Q. Did the child appear to be alive or dead?

A. No, he was already dead.

Q. Did you look to see whether or not the child was breathing?

A. Yes, together with Mr. Luna. He examined him first and then I examined him afterwards just to ascertain whether he was dead or alive.

Q. Was the child breathing?

A. No.

Q. Are you sure that this incident you have described took place on the 18th of April?

(Testimony of Jose Bello.)

A. Yes, because this accident was a very peculiar accident and I was there part of the night after the accident [30] happened.

Mr. Maddox: That is all.

The Court: Why did you stay there?

The Witness: Because there was no one else there to watch the road, so that someone else wouldn't have any more accidents.

The Court: You were there when they took the people away?

The Witness: Yes.

The Court: Were they all alive when they left or were taken away?

The Witness: Neither one of the two were alive. They were dead. They had taken the lady away alive.

The Court: Did a separate vehicle take those away that were dead?

The Witness: No, they took the lady away in the ambulance.

The Court: What did they take the others away in?

The Witness: They were taken also in an ambulance but later on.

The Court: You may cross examine.

Cross Examination

Q. (By Mr. Templeton): Mr. Bello, what training have you had in a medical way—what type of medical training, if any, have you had? [31]

(Testimony of Jose Bello.)

A. Well, the essential training for first aid that is taught in schools.

Q. That is the only training that you have had?

A. Yes.

Q. Were you acquainted with the man in the rural police who informed you of the accident?

A. No.

Q. Is there a radio in the car that you were riding in with Mr. Luna? A. No.

Q. Was there a radio in the rural police car if you know? A. Yes.

Q. Did the rural policeman tell you how he found out about the accident? A. No.

Mr. Templeton: That is all.

Mr. Maddox: I didn't identify these people. May I do that, your Honor?

Redirect Examination

Q. (By Mr. Maddox): Mr. Bello, did you find out who the persons were in the automobile?

The Court: There is no argument about that is there, counsel? [32]

Mr. Templeton: I don't think so.

Mr. Maddox: All right.

The Court: Call your next witness.

Mr. Maddox: I might say this, that that is substantially my case. I have two other witnesses whose testimony would relate to one thing, the death certificate and the autopsy report which shows the date of death was the 19th. There is testimony showing it was on the 18th when the accident happened and

I have the testimony of two persons who went down there on the 19th. That would be to establish the date of death.

The Court: Are they local witnesses?

Mr. Maddox: Yes.

The Court: And you can call them any time?

Mr. Maddox: Yes.

The Court: Very well. These are the only witnesses from a distance?

Mr. Maddox: That is all. Of course I really don't need them unless this autopsy report—unless there is something else in issue that I am faced with.

The Court: I am not satisfied with the certificate of death and I am going to give counsel an opportunity to see if he can locate any evidence upon which the certificate of death was based.

Now apparently this father and his son were coming home [33] from a fishing trip with their paraphernalia in the car. It happened in a rural area and I don't know how the coroner would have any information unless he had some witnesses on which to base his certificate. And unless there is something to overcome the testimony of these witnesses it seems to me that I am going to have to hold it was simultaneous death.

Mr. Templeton: Your Honor, in regard to the time that is necessary, it takes considerable time to get any work done down in Mexico.

The Court: I am going to continue this matter until 2:00 o'clock March 1st.

Mr. Templeton: Your Honor, I doubt very seri-

ously that that will give sufficient time so far as I am concerned. Every time I try to get something in Mexico it takes so much longer than it does here that I feel that would not be sufficient. I will have to use a Mexican reporter and interpreter down there and I really believe that we should go over a little further.

The Court: Well, see what you can do by March 1st at 2:00 o'clock.

Mr. Templeton: And, counsel, I am willing to stipulate that these other matters, the way the court determines this matter, will be determinative of the others under the statute. Isn't that right, counsel?

Mr. Maddox: I think that would apply. [34]

Mr. Templeton: And consequently we would be wasting time in the other two proceedings to hear the matter there again, so I am willing to stipulate with counsel that those matters may go off calendar.

The Court: Those are matters that I have nothing to do with.

Mr. Maddox: If I may say something? On your last comment you said unless the testimony of these two witnesses is going to be overcome you will have to consider it as a simultaneous death.

I think the testimony of these witnesses will show that it was not a simultaneous death.

The Court: That has the same effect as far as you are concerned, as if there were a simultaneous death.

Mr. Maddox: No, not at all. We are saying it is not a simultaneous death; that the father survived and of course there are cases which say the period

of survivorship does not matter—if it is just an instant, just a moment. We contend that the father survived the son.

The Court: Well, let us find out what the facts are, gentlemen.

Mr. Maddox: If it is simultaneous under the law——

The Court: Let us not argue the facts until they are all in. I will give counsel an opportunity to take depositions. However, I think it is an unfortunate situation in [35] a tragedy of this sort where people can't forget the dollars and cents and get together on a matter like this.

Mr. Templeton: I have tried.

Mr. Maddox: I want the record to show I am objecting to any continuance for Mr. Templeton to gather additional evidence because I think he has had ample time.

The Court: All right. The court on its own motion will continue the case until *May* 1st at 2:00 o'clock.

(Whereupon, at 3:35 o'clock p.m. the above-entitled matter was continued until 2:00 o'clock p.m., March 1st, 1954.) [36]

Monday, March 15, 1954, 2:00 p.m.

The Clerk: You may proceed.

The Clerk: 15,951, Prudential Insurance Company versus Sarah Padre.

Mr. Templeton: We are ready, your Honor.

Mr. Maddox: We are ready.

The Court: You may proceed, gentlemen.

Mr. Maddox: We will rest, your Honor, on the testimony we have already given.

Mr. Templeton: Then, your Honor, I would like to call Mr. William Hahn.

WILLIAM J. HAHN

called as a witness by the defendant Sarah E. Padre, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Templeton): Mr. Hahn, you are the son of Mr. S. D. Hahn, the plaintiff—administrator in this action? A. Yes, sir.

Q. And in connection with the bringing of the bodies of Young D. Hahn and Herbert H. Hahn across the border, you were the one that went down to Mexicali for that purpose? A. Well——

Q. Just answer yes or no. Did you go down there for [38] that purpose?

A. Partially, yes, sir.

Q. And did you make the arrangement for bringing the bodies across the border?

A. No, I didn't.

Q. Well, do you know what date the bodies were brought across the border? A. No, I don't.

Mr. Templeton: That is all.

The Court: Any questions?

Mr. Maddox: No questions.

Mr. Templeton: Your Honor, I have the original depositions here of Celestino Lupercio Perez and

Gustavo Arevalo. How does your Honor want us to handle these depositions? Do you want us to read them into the record?

The Court: There are two depositions?

Mr. Templeton: We have two depositions.

The Court: I have read them.

Mr. Templeton: Then the only question would be the ruling upon the objections that have been made in the record as to those.

The Court: Have you any additional evidence?

Mr. Templeton: Yes, I do, your Honor, definitely.

I will offer these two depositions. They will either have to be read into the record or maybe counsel will [39] stipulate that the depositions may be read by the court and the court pass upon the objections that have been made and rule upon those objections without counsel being present.

I am willing to so stipulate.

The Court: I think you can stipulate they have deemed to have been read. There is no use reading them again. I have already read them.

I did not see any objections in the depositions that I considered very serious, counsel.

I don't consider that they add very much to what has already been introduced here in evidence.

I was interested in seeing what the autopsy surgeon had to say. The autopsy surgeon expressed an opinion but that opinion is in direct conflict with the testimony that has been introduced here by two other witnesses, eye witnesses.

As to the other witness, I don't see where he has testified to anything that adds to the time of death.

I would like to have counsel point out anything that is helpful in the depositions—not the deposition of the autopsy surgeon but the other deposition.

Mr. Templeton: I would like to argue that after this other testimony is in because it ties into the other testimony that is going to be introduced. May I be permitted to do that?

The Court: I will permit you to argue it, of course. [40]

Mr. Templeton: In other words, where that deposition will tie in is as to the time and in my opinion will tend to discredit the other two witnesses that were on the stand.

The Court: Well, of course there is a conflict but I want to say frankly, counsel, that I thought you could get some better evidence than you have.

Mr. Templeton: I have other evidence.

The Court: I am not satisfied with the opinion that the autopsy surgeon gave in view of the two witnesses' direct testimony as to what took place.

Mr. Templeton: It was offered, your Honor, as purely opinion evidence by an expert witness.

The Court: I wouldn't attach much weight to the testimony of the autopsy surgeon who figured out there there were three hours difference in the time of death. I don't take that as sufficient to overcome the testimony of the witnesses who testified here. I am frank to say that, counsel. I thought that there would be some testimony one way or the other.

Mr. Templeton: I definitely have it, your Honor.

The Court: I haven't heard it yet.

Mr. Templeton: I haven't gotten to it yet.

The Court: I think you can stipulate the objections are overruled. I don't think the depositions add much to this record one way or the other. It depends on which position [41] opposing counsel wants to take.

Mr. Maddox: I have no point to urge as to these objections. Most of these objections were as to foundation. I think that was cured later on in the proceedings, so I am willing that these go into evidence and we proceed with whatever else counsel has.

Mr. Templeton: At this time I offer in evidence Plaintiff's Exhibit No. 1 for identification, which was the autopsy surgeon's report with respect to Young Hahn, which has been identified by him as having been made by him in connection with the——

The Court: That doesn't add anything to his deposition, does it? As I recall his testimony it was his opinion that there was a three hour difference in time between the deaths, but it seemed to me that the testimony with reference to the temperature of the bodies—he didn't make any test of the temperature or deterioration. He admitted that. He admitted that that was not done. I don't think his deposition adds anything to the case. You have here the testimony of two positive witnesses who say that one was alive and that one was dead following the accident.

Mr. Templeton: That is true.

The Court: And I think it would take pretty strong evidence to overcome that.

Mr. Templeton: And I have that evidence. [42]

The Court: Well, I want to hear it.

Mr. Templeton: Your Honor, I renew my offer in evidence of this exhibit that is now Exhibit No. 1 for identification.

The Clerk: Which is it, please?

Mr. Templeton: It is a certified copy of the autopsy report as to Young D. Hahn.

The Court: I shall not admit it because I think the deposition covers it.

Mr. Templeton: I also desire, your Honor, to offer in evidence Exhibit No. 2 for identification which is the autopsy surgeon's report as to Herbert Huxley Hahn.

The Clerk: I have marked your exhibits with letters, Mr. Templeton.

The Court: Marked for identification.

Mr. Templeton: They were for identification.

The Clerk: They haven't been marked.

The Court: I can't prevent you from having them marked for identification.

Mr. Templeton: They were in the deposition for identification.

The Court: He refers to them all the time and as I recall in his original notes—he did not have his original notes and he had to refer to those to refresh his memory.

The Clerk: Will you show me what documents they are, please? We use letters on your exhibits.

Mr. Templeton: It was offered as No. 1 to the deposition.

The Clerk: We will mark it Padre Exhibit B for identification.

(The document referred to was marked Padre Exhibit B, for identification.)

Mr. Templeton: And will you mark this next one?

The Clerk: Padre Exhibit C for identification.

(The document referred to was marked Padre Exhibit C, for identification.)

Mr. Templeton: Now if the court please, at this time I offer in evidence Exhibit B for identification, which is a certified copy of the autopsy report as to Young D. Hahn.

The Court: Have you any objection to its admission, counsel? I don't see that it has anything to do with his deposition.

Mr. Maddox: Since he testified from it it might be permissible for that reason.

The Court: It will be admitted for that purpose.

(The document referred to, and marked Padre Exhibit B, was received in evidence.)

Mr. Templeton: And I am now offering in evidence——

The Court: The same ruling as to the second one.

(The document referred to, and marked Padre Exhibit C, was received in evidence.)

Mr. Templeton: Will you mark this for identification?

The Court: What is that?

Mr. Templeton: This is the report used by the witness Perez to refresh his memory as to the facts with respect to the accident which were made by

him immediately, dictated by him immediately and then read over by him and signed by him immediately after the accident. And this is the excerpt from that which he definitely identified as being the record.

The Clerk: Padre Exhibit D for identification.

Mr. Templeton: I offer it in evidence.

The Court: It will be admitted. I think he cross examined him on that, did he not?

Mr. Maddox: Yes, I did.

The Court: May I see?

Mr. Templeton: Your Honor, I forgot to ask Mr. William Hahn one question. Mr. Hahn, will you take the stand again.

(The document referred to, and marked Padre Exhibit D, was received in evidence.)

WILLIAM J. HAHN

a witness called by the defendant Sarah E. Padre, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination—(Resumed)

Q. (By Mr. Templeton): Mr. Hahn, did you see the automobile that your [45] uncle and cousin were riding in after the accident? A. Yes, sir.

Q. And where did you see it?

A. I saw it at the—well, I guess they would call that the headquarters of the highway police or something. It was in the yard in back.

Q. Do you know the name of the place where you saw it? A. I don't know the name.

(Testimony of William J. Hahn.)

Q. It was there on the yard? A. Yes.

Q. And they would not permit its removal, would they?

A. I don't know because I didn't attempt to remove it.

Q. Do you know what the license number of that car was? A. No, I don't.

Q. I will ask you to take a look at these pictures, Mr. Hahn, and ask you if those are pictures of the car as you saw it on the lot at the district traffic office?

A. Yes, it seems to be the car.

Mr. Templeton: I offer these pictures in evidence, your Honor, as the Padre Exhibit next in order. I took the pictures myself on the 17th day of February in the yard of the district traffic office at Mexicali. That is all.

Mr. Maddox: What year? [46]

Mr. Templeton: This year.

Mr. Maddox: Object to that as being too far removed from the time of the accident.

The Court: What do you claim these pictures show?

Mr. Templeton: The only purpose is to show the condition of the car. We know where the man was riding. It is one of the cumulative facts in evidence which show the possible extent of the injury from the condition of the car itself.

The Court: Do you know whether that car was in that condition at the time of the accident? They were taken how soon after the accident?

(Testimony of William J. Hahn.)

Mr. Templeton: This was taken on the 17th of February this year. I will ask one further question.

Q. (By Mr. Templeton): Does that car, the picture there, appear to be in the same condition—that is the car, does it appear to be in the same condition as it did when you saw the car shortly after the accident? A. It appears to be.

The Court: That will be admitted.

Mr. Templeton: That is all.

The Court: Any questions?

Mr. Maddox: No.

The Clerk: Padre Exhibit E in evidence.

(The photograph referred to, and marked Padre Exhibit E, was received in evidence.)

Mr. Templeton: My witness will need an interpreter.

The Court: Do you have an interpreter?

Mr. Templeton: Yes, Joe Lopez.

(Joe Lopez was sworn as interpreter.)

GALDINO LOSA CRUEVAS

called as a witness by defendant Sarah E. Padre, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Galdino Losa Cruevas.

Direct Examination

Q. (By Mr. Templeton): Mr. Cruevas, what is your profession? A. I drive a taxi.

(Testimony of Galdino Losa Cruevas.)

Q. And were you so employed on the 18th of April, 1953? A. Yes, sir.

Q. And on that date did you enter into an agreement for—were you employed by a lady to drive her from Tijuana to Mexicali?

A. Yes, sir.

Q. Did you drive her in your car or in her car?

A. In her car.

Q. Do you know who this lady is?

A. Yes, I do.

Q. Did you know her name on that date? [48]

A. At that time, no.

Q. Had you ever driven for her prior to that date? A. Yes.

Q. What time did you leave Tijuana?

A. At 9:00 o'clock at night.

Q. On what date? A. On a Saturday.

Q. Was it the 18th of April 1953?

A. Yes, sir.

Q. At what speed were you traveling from Mexicali—from Tijuana to Mexicali?

A. Between 30 and 35 miles.

Q. Did you make any stops on the way?

A. Yes, four.

Q. What stops did you make on the way to Mexicali?

A. The first one was at Presa—Presa Rodriguez.

Q. Where was the second one?

A. Cuesta Blanca.

Q. Where was the third one?

A. Rumurosa.

(Testimony of Galdino Losa Cruevas.)

Q. And where was the next time you stopped?

A. Where the accident was.

Q. And the next time you stopped?

A. At the hospital.

Q. About what time did you arrive at Rumurosa? [49]

A. About 11:00 o'clock at night.

Q. And were you requested by the lady to stop at Rumurosa and these other places?

A. Yes. She told me to stop. She want to take some medicine and also coffee.

Q. And when you arrived—while you were at Rumurosa did you observe a Nash automobile pass you? A. Yes.

Q. At approximately what speed was it going?

A. About 50 miles.

Q. And did you see who was driving the car?

A. A lady.

Q. And did you see anyone else in the car?

A. I could see some person inside.

Q. Did you again see that car that same night?

A. Yes, about 45 minutes afterwards when the accident happened.

Q. Was that about 45 minutes after you had left Rumurosa on your way to Mexicali?

A. Yes.

Q. And when you arrived at the scene of the accident what did you find?

A. (No answer.)

Q. What did you see?

A. I met the car, the one that passed me and

(Testimony of Galdino Losa Cruevas.)

I also [50] met a lady that was thrown down on the ground.

Q. Had the car hit something?

A. Yes; it had hit a machine that was standing there, a cement machine.

Q. And was the car up against the machine, the cement machine or not? A. Yes.

Q. And where was the lady?

A. She was laying on the ground, on the floor, right in the middle of the road.

Q. On which side of the car?

A. The lady?

Q. Yes.

A. On the left side—on this side.

Q. On the driver's side of the car?

A. Yes, sir.

Q. Did you go up and examine the car?

A. We stopped and the watchman told us to help him to see what had happened in there.

Q. What did the watchman tell you had happened?

The Court: That is hearsay.

Mr. Templeton: I will withdraw the question.

Q. (By Mr. Templeton): Did you observe a man in the car? A. Yes. [51]

Q. What did you observe about the man?

A. He was dead.

Q. Was he making any sound whatsoever?

A. No, no.

Q. Where was his face with respect to the windshield of the car?

(Testimony of Galdino Losa Cruevas.)

A. About, more or less, about five inches from the glass.

Q. What was the condition of the weather?

A. Cold.

Q. Was the wind blowing?

A. There was a lot of wind. It was just a lot of wind.

Q. Did you determine whether or not the man was or was not breathing?

A. Yes, well, yes, I noted that he wasn't breathing at all.

Q. Did you see the boy at that time?

A. No, I did not see him. Only I heard that he was making a kind of noise, but I saw him when they took him out.

Q. After you got to the scene of the accident what did you do with respect to trying to obtain help?

A. Well, I stopped and I got my flashlight out in order to stop any car that might come, because she was [52] laying in the middle of the road.

Q. And did any of the cars stop?

A. Only one.

Q. Approximately how many cars went by before this one car stopped?

A. Around 15 cars.

Q. And how long was it after you got to the scene of the accident before the first car stopped?

A. About 15 minutes—between 15 and 20 minutes.

Q. And did the car that stopped—do you know

(Testimony of Galdino Losa Cruevas.)

whether—well, did the car drive on to some other place, the first car that stopped? Did the car drive on toward Mexicali? A. Yes.

Q. And how long was it before any police cars arrived at the scene of the accident?

A. About a half hour.

Q. What cars arrived at the scene of the accident? What police cars arrived there?

A. First the police, the traffic officer arrived first. About two or three minutes after that the police arrived.

Q. By the traffic officer do you refer to the Federal District Traffic Officer?

A. Do you want me to say that is the officers?

Q. No, just answer my question. Read the question.

(Question read.)

A. Yes, Federal.

Q. And what were the other police officers that you referred to?

A. The traffic officers arrived first and then the other ones with the policemen.

Q. And the police. Where were the police from, if you know? A. Mexicali.

Q. Do you know what the number of the police car was? A. Yes.

Q. What was it? A. No. 1.

Q. And how long was it—what interval was there between the time that the Federal Traffic Officers arrived and the Mexicali local police arrived?

(Testimony of Galdino Losa Cruevas.)

A. From Mexicali to where the accident was?

Q. No, no, the difference between—I will withdraw the question.

After the Federal Traffic Officers arrived at the scene of the accident how long was it before the Mexicali police arrived at the scene of the accident?

A. Oh, two or three minutes. They came right over. [54]

Q. After the police arrived what did you observe?

A. They opened the car. They took the baby out of the car and gave to me—put it in my hands.

Q. How was the baby placed in your arms?

A. I put my hands like this and they put the baby right over my hands.

Q. Indicating with his hands outstretched in front of him. How handed the baby to you?

A. The traffic—one of the traffic officers.

Q. And at the time the boy was handed to you did you determine whether or not he was dead or alive?

A. He was alive yet.

Q. Did you hear him make any noises or not?

A. Yes; he was making noises like he was very sore.

Q. Will you show the court as near as you can the type of noise that the boy was making?

(Witness demonstrating.)

Q. Was the boy's body warm or cold?

A. It was warm. It was alive.

Q. And what did you do with the boy?

(Testimony of Galdino Losa Cruevas.)

A. I put the baby on the back seat of the car in order to take him away.

Q. At whose request did you put the boy in your car?
A. The officer.

Q. Which officer? [55]

A. The traffic officer.

Q. Did you see what happened to the woman?

A. They picked her up. The traffic officer picked her up. The officer put her on the car because my car was in back of the police car.

Q. Well, which officer put her in a car?

A. The local officers.

Q. And were you given any instructions by the traffic officers as to what to do with the boy?

A. They told me to follow them until we arrive at the hospital.

Q. Which officers told you that?

A. The traffic officers.

Q. And did the local police car then leave the scene and head toward Mexicali?

A. Yes. They went to the hospital right away.

Q. And did you follow immediately?

A. Yes.

Q. Did you keep up with them?

A. Not quite too close because the baby was sick and also the lady was sick.

Q. By the lady you are referring to the lady who was riding in the car with you?
A. Yes.

Q. After the baby was placed on the back seat of [56] the car where did the woman that was with you sit?

(Testimony of Galdino Losa Cruevas.)

A. In the front, on the front seat.

Q. Was she—do you know whether or not she was or was not looking at the boy?

A. Yes, she was holding him here.

Q. Indicating with the right hand. In other words she was in the front seat with her hand over to the back seat? A. Yes, sir.

Q. How long did it take you to get from the scene of the accident to the hospital at Mexicali?

A. About a half hour.

Q. And when you arrived at the hospital in Mexicali—I will withdraw that.

Did anything happen to the boy that you know of while you were enroute from the scene of the accident to the hospital at Mexicali?

A. Just as we arrived at Mexicali he pass away. The lady that was with me said to me “He is dead now.”

Mr. Maddox: Move to strike the last answer as hearsay.

The Court: Motion granted.

Q. (By Mr. Templeton): Mr. Cruevas. you arrived at the hospital—when you arrived at the hospital what was then done with respect to the body of the boy?

A. They took the baby out of the car and put him [57] inside the hall.

Q. Who took the baby out of the car?

A. The local officers. I just opened the door for them.

(Testimony of Galdino Losa Cruevas.)

Q. Was that the same officer that was at the scene of the accident?

A. Yes, the car No. 1. They are the ones that took the lady.

Q. When you went and looked at the man did you notice whether there was or was not any moisture on the inside of the windshield?

A. There was no fog. Only lots of wind was going on.

Q. Mr. Cruevas, on the inside of the windshield in front of the man's face did you notice whether there was or was not any moisture in front of his face? A. No, it was not.

Mr. Templeton: Your Honor, we have a stipulation that the three people that were in the car as to whom this witness has testified, were Mrs. Ella Moya Diaz, Herbert Huxley Hahn and Dr. Young D. Hahn.

Mr. Maddox: Stipulate to that.

Mr. Templeton: I offer in evidence a map of the road showing these towns merely for the court's guidance and that is a map by the National Automobile Club. I do not offer [58] it for the purpose of showing the exact accuracy of it at all but only to show the road.

The Court: Any objection?

Mr. Maddox: No questions.

Mr. Templeton: Cross examine.

(The document referred to was marked Padre Exhibit F, and was received in evidence.)

(Testimony of Galdino Losa Cruevas.)

Cross Examination

Q. (By Mr. Maddox): Mr. Losa, you said that when you first arrived at this accident you saw the man but you did not see the boy, is that true?

A. No; I didn't see the child because it was covered with the seat. I couldn't see him.

Q. Have you ever had any kind of medical training, Mr. Losa? A. No.

Q. Have you ever had any training in first aid?

A. Many times.

Q. Under what circumstances?

A. Well, just helping around where there is any accident.

Q. My question was have you ever had any training.

The Court: Schooling you might ask.

Q. (By Mr. Maddox): Schooling in first aid?

A. No, no, no schooling.

Q. On what do you base your opinion that the man was dead?

A. Because it was laying in there—wouldn't move, wouldn't breathe. Anybody can tell a dead man.

Mr. Maddox: I move to strike that.

Q. (By Mr. Maddox): You told Mr. Templeton that there was no moisture on the windshield in front of the man's face. Did you look to see whether or not there was any moisture?

A. No, there was none.

The Court: How do you know?

(Testimony of Galdino Losa Cruevas.)

The Witness: Because I put my flashlight right close to him that way.

Q. (By Mr. Maddox): Why did you do that?

A. To find out if he was just hurt or sick or dead because the night watchman told me to look "Look here this man is dead."

Mr. Maddox: I move to strike that as not responsive.

Mr. Templeton: I think it is responsive. He asked what the basis was.

The Court: Objection overruled.

Q. (By Mr. Maddox): Did you have a conversation with any of these police officers that night?

A. Absolutely none.

Q. Do you know a police officer by the name of Celestino [60] Lupercio Perez. A. No.

Q. You referred to one police officer as a traffic officer and another one as a local officer?

A. Yes; there were two of them.

Q. Which one was driving this car No. 1?

A. The local officer.

Q. Did the local officer ever give his name?

A. No.

Q. Did you give the officer your name?

A. Yes; at the hospital I gave all the information I knew.

Q. Well, did you talk with him? Did you have a conversation with him?

A. Yes; when I arrived at the hospital with the baby.

(Testimony of Galdino Losa Cruevas.)

Q. Was that the first time you had any conversation with him?

A. That was the first and last.

Q. Did you not discuss the condition of the boy at the scene of the accident? A. No, sir.

Q. You stated that you drove into town behind the police officer's car. Was that true?

A. Yes.

Q. And was that the local officer driving car No. 1? [61] A. Yes.

Q. And that is the same officer that you gave this information to at the hospital?

A. Yes, that is the same one.

Q. Is he the same one who took the boy's body out of the car? A. No.

Q. Who took the body out of the car?

A. The traffic officer.

Q. What was the local officer doing while the traffic officer was taking the body out of the car?

A. He was picking up the lady.

Q. And did he put the lady in his car?

A. Yes, into the police car, yes.

Q. How long did this local officer stay at the scene of the accident?

A. Oh, about five minutes.

Q. And were you there when he arrived?

A. Yes.

Q. Were you there when he left?

A. Yes; we went together.

Q. What was that? A. We went together.

Q. Went where together?

(Testimony of Galdino Losa Cruevas.)

A. To the hospital. [62]

Q. Did the local police officer look at the boy to see if he was living?

A. The local officer? No. The traffic officer was the one.

Q. How close was your car parked to the car of the local officer? A. About a mile.

Mr. Templeton: Will you read the question and answer?

Mr. Maddox: Will you ask the question again? I think the witness misunderstood.

A. The car of the accident was in the middle. My car was on the right-hand side and the car of the officer was on the left side.

Q. (By Mr. Maddox): Did the local police officer tell you to follow him into town?

A. Yes.

Q. Did he at any time see the boy?

A. Not until we got to the hospital.

Q. He saw the boy when you had him in your arms—when the other officer handed him to you in your arms, did he not? A. Yes.

Q. You mean that he did not closely examine the boy until you arrived at the hospital?

A. The officer did not see the boy until we arrive at [63] the hospital.

The Court: Where is the woman who was your passenger that night? Do you have her as a witness?

Mr. Templeton: No, your Honor. I haven't. I have made every effort to locate her and I went

(Testimony of Galdino Losa Cruevas.)

with this gentleman over to the place where she had lived there in Mexicali and determined from the people there that she had left there approximately two months before, for somewhere in the States.

And that night—I mean last night when I was bringing this man up from Tijuana for the first time he told me that he had gone back over there and he had gotten the name from someone over there. They told him that this woman's name was, I believe, Ernestine Thomas.

Q. (By Mr. Templeton): What was the name of the woman that you told me you found out just the other day? A. Ernestine Thomas.

Mr. Templeton: Ernestine Thomas. And that is the first time I even heard her name.

I inquired of the people where she was residing and the only thing they knew she was married to a North American citizen of the United States, whose name was, they thought, was Thomas. They didn't know where she had gone.

I inquired of the immigration authorities there at the border. They could not give me any information unless I could give them her maiden name.

Then I found out last night that she is supposedly living in Coronado but it was then too late. I couldn't do anything at 8:30 last night to try to locate the woman at that stage and that is the first knowledge that I have gotten as to her name or where she might possibly be located.

(Testimony of Galdino Losa Cruevas.)

The Court: Proceed with your cross examination.

Mr. Maddox: Will you read the last question and answer please?

(Question and answer read as follows:

“Q. What was the name of the woman that you told me you found out just the other day?

“A. Ernestine Thomas.”)

Q. (By Mr. Maddox): You said a few moments ago, did you not, that the officer did see the boy when he was handed into your arms?

A. There are two kinds of policemen. Some of them are Federal. The other ones are local officers. I meant the traffic officer was the one that gave him to me. The other one was attending to the woman.

Q. When the traffic officer handed you the boy and you put the boy into your car that was all done in the presence of the local officer, was it not?

A. No, because they were attending to the woman. They were taking the lady over to the other car.

Q. Now, you said that the traffic officers told you to [65] follow them to the hospital. Strike that. I withdraw that.

You said the local officer told you to follow him to the hospital? A. Yes.

Q. Before that had you told the local officer that you had the boy in your car?

The Court: What was the question?

Q. (By Mr. Maddox): Before that had you

(Testimony of Galdino Losa Cruevas.)

told the local officer you had the boy in your car?
I will ask it again.

Before the local officer told you to follow him to the hospital had you told him that you had the boy in your car?

A. I already had the child in the back of my car. He ordered me to come on, "let us go."

Q. All right. Was the traffic officer alone or was there another officer in the car with him?

A. There were two of them.

Q. Do you know the name of the other one?

A. I don't know the name of either one of them.

Q. Was the Federal officer alone or was there another car with him?

A. There were two local officers and two Federal officers.

Q. So then there were four officers there at one time? A. Yes. [66]

Q. Did the Federal officer leave at the same time the local officer left? A. No.

Q. Was this child a young baby?

A. No; it was around 13 years old.

The Court: Any more questions?

Mr. Maddox: Wait just a minute, your Honor. I think so.

Q. (By Mr. Maddox): Did you, Mr. Losa, check the pulse of the man in the car at the time you arrived there? A. The one I was taking?

The Court: No, the man.

The Witness: No, no.

Mr. Maddox: No other questions.

(Testimony of Galdino Losa Cruevas.)

The Court: Any further questions?

Mr. Templeton: Yes, Mr. Cruevas.

By the way, your Honor, Mr. Maddox refers to him as Mr. Losa but he prefers to be called by the last name of Cruevas. We are both referring to the same man.

Redirect Examination

Q. (By Mr. Templeton): Mr. Cruevas, were you ever prior to the time you were in the taxi business, were you ever in the Army, in the Mexican Army? A. Yes, a long time ago.

Q. And what rank did you obtain? [67]

A. Regiment No. 72.

Q. What was your rank?

Mr. Maddox: Object to that as immaterial.

The Court: I think he wants to show—objection overruled.

The Witness: I was driving a horse—horse riding.

Q. (By Mr. Templeton): Did you obtain the rank of captain, lieutenant, major or just a private?

A. Yes, I was lieutenant.

Q. Mr. Cruevas, you stated that you did not know the name of the policeman from the Mexicali police department. Did you know the man by sight? A. One of them, yes.

Q. And was that the man that took the information from you at the hospital?

A. Yes, he is the officer.

Q. What was done if you know—withdraw that.

At the time when you left the scene of the acci-

(Testimony of Galdino Losa Cruevas.)

A. No.

Q. Were you arrested about June of 1952?

The Court: Just a moment. That is not a proper question.

Mr. Templeton: Just a moment.

The Court: "Was he arrested"?

Mr. Maddox: I am trying to refresh his memory, your Honor, as to the time of the occasion.

The Court: You asked an impeaching question and he said no. If you have evidence to the contrary you can introduce it. When counsel asks that question he had better ask it in good faith and be able to prove it.

Mr. Maddox: I am going to prove it by him. If it can't be proven this is a judge court and not a jury.

The Court: What is that?

Mr. Maddox: I don't think any prejudice will result from this. I am trying to find out now——

The Court: Well, he answered the question, and I think that is as far as you can go. You asked the question: "Were you convicted of a felony." That is the only way you can impeach him in that regard.

Mr. Maddox: I have no further questions.

The Court: That is all.

Mr. Templeton: That is all.

If the court please, I think that the woman in this case is a material witness. As I stated before I did everything [71] I could to get her name and address where I might locate her.

With the court's indulgence I would like additional time to bring that evidence before the court. The only way I can do it is to go out——

The Court: I think we had better finish the case up today. I have given you one continuance, counsel.

Mr. Templeton: I understand, your Honor, but I wanted to show the court my intention of good faith to bring all the witnesses here.

The Court: Have you any other witnesses?

Mr. Templeton: No, your Honor.

The Court: Have you any rebuttal?

Mr. Maddox: Your Honor, there is one issue as to the date that this happened. I think in my mind it has been resolved; I don't know whether the court has any question.

The doctor stated they died on the 19th. He examined the bodies on the 19th and they had died just shortly before that.

Now, of course, the evidence has already been presented that this happened on the night of the 18th by Mr. Templeton's witness.

I would have another witness only as to that one limited point, that this occurred on the 18th and that to contradict the testimony of the doctor that this happened on the 19th.

Mr. Templeton: Your Honor, I don't think the question of [72] whether it happened on the night of the 18th or the night of the 19th is really material here. I think we are all testifying about the same thing, the same accident.

The Court: I think that is true.

Mr. Templeton: The accident took place on Sat-

urday night and the question of whether or not the death took place a little after midnight or not is a question for the court to resolve.

Mr. Maddox: He said he was called on Sunday night.

The Court: And the death occurred shortly before that. That was his testimony. I don't think that is material.

I am also frank to say that I don't think his testimony adds very much one way or the other. I don't think that these people died so closely together—strike that. I do not think that he can tell that one died three hours before the other. I just can't put any weight to it.

Mr. Templeton: It was only for the purpose of giving the court the benefit of such evidence as we could bring to the court by an expert witness who did examine the bodies. That was the only purpose of it.

The Court: Have you both rested?

Mr. Templeton: Yes.

Mr. Maddox: We rest.

The Court: I am willing to hear from counsel but I want to tell you what I am thinking before you argue. [73]

I think the evidence is so conflicting and so uncertain that there is only one thing the court can rightfully hold that one died before the other. It is one of those cases where you can't determine the exact time. There is such a conflict in the evidence and the circumstances are such that both parties died so closely together, at least the evi-

dence doesn't convince me one way or the other. I wouldn't want to find either way. Now, that is the way I feel about it. I will listen to your argument.

Mr. Templeton: I would like to argue the point.

The Court: You may do so.

(Argument reported but not transcribed.)

The Court: I will make a finding of fact that it is one of those accidents in which both were killed simultaneously. It is difficult to determine which one breathed the last.

Mr. Maddox: Do you want me to prepare findings?

The Court: Submit them to counsel under the rules for his approval.

(Whereupon at 3:30 o'clock p.m. the above-entitled matter was concluded.)

[Endorsed]: Filed December 23, 1954.

[Title of District Cause and Cause.]

The deposition of Doctor Gustavo Arevalo, taken on behalf of Sarah E. Padre in Room 110, DeAnza Hotel, in the City of Calexico, County of Imperial, State of California, commencing at approximately 10:10 o'clock a.m. on the 27th of February, 1954, before M. Gayle Amack, a Notary Public within and for the County of Imperial, State of California, pursuant to notice.

DEPOSITION OF GUSTAVO AREVALO

Appearances: For S. D. Hahn: Edward Carter Maddox, Attorney at Law. For Sarah E. Padre: Templeton and Miller, Attorneys at Law, by Harry E. Templeton. [1*]

DOCTOR GUSTAVO AREVALO

a witness produced on behalf of Sarah E. Padre, being first duly sworn to state the truth, the whole truth and nothing but the truth, testified on his oath as follows:

Direct Examination

Q. (By Mr. Templeton): Will you state your full name? A. Gustavo Arevalo.

Q. You are a doctor? A. Yes.

Q. What is the extent of your medical education, Doctor? Where were you educated, your medical education? A. Mexico City.

Q. And in what school?

A. Medical school, Medical Army School, Escuela.

Q. And, Doctor, did you graduate in medicine?

A. Yes, sir.

Q. From that school. What degree, what medical degree [2] do you hold?

A. Medicine, Doctor, no.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

(Deposition of Dr. Gustavo Arevalo.)

Q. That is the equivalent of what in America we call the "MD"? A. Yes.

Q. And, Doctor, how long have you been practicing medicine? A. Twelve years.

Q. And where have you been practicing?

A. Mexico City.

Q. And have you been practicing——

A. (Interrupting) Also in Mexicali.

Q. In Mexicali?

A. Yes. The last seven years.

Q. And, Doctor, what is the nature of your practice, is it a general practice?

A. General practice.

Q. Or is it specialized? A. General.

Q. General practitioner. Doctor, on or about the 19th of April, 1953, did you hold any official position with the government of the Territory of Baja California? A. Yes.

Q. What was that position?

A. Like forensic medicine, no.

Q. Well, is that or is it not similar to the autopsy [3] surgeon in the United States?

A. Yes.

Q. Doctor, in that official position with the Government what are your duties?

A. Perform the autopsies to the bodies.

Q. In that official capacity did you, on or about the 19th of April, have occasion to view the bodies of Young D. Hahn and Herbert Huxley Hahn?

A. Yes.

Q. And where did that take place?

(Deposition of Dr. Gustavo Arevalo.)

A. In Mexicali hospital in the morgue.

Q. And did you perform the autopsies upon the body of Young D. Hahn and upon the body of Herbert Huxley Hahn? A. Yes.

Q. And when did you examine those bodies?

A. On——

Q. (Interrupting) Well, I mean do you know the date? A. The 19th of April, no.

Q. April 19th of 1953? A. Yes.

Q. Doctor, what did you find to be the then condition of the body of Doctor Young D. Hahn?

A. The cause of the death, you say?

Q. No, what was the condition of the body? In other words, what injuries did you find, if any?

A. He got a fracture of the skull and a big contusion [4] of the thorax.

Q. Now, by “thorax” keep in mind, Doctor, that we are laymen and we don’t understand some of the medical terms. By “thorax” what do you mean?

A. The chest, no. A chest injury.

Q. And what was the nature of the head injuries that he sustained?

A. Well, was fracture of the base of the skull, no.

Q. Well, was the skull, was it broken open or——

A. (Interrupting) Closed fracture, no open wound.

Q. And were there any injuries to the face?

A. Yes.

Q. And what is the nature of the injury to the face? A. Contusion.

(Deposition of Dr. Gustavo Arevalo.)

Q. And was that severe or not?

A. Well, severe because they caused the death, you know.

Q. And what other injuries, other than what you have described, did you notice on the body of Doctor Young D. Hahn?

A. Big hemorrhage.

Q. And where—was that internal hemorrhage?

A. Internal hemorrhage.

Q. Did you, as the result of your examination of the body of Doctor Young D. Hahn, formulate an opinion as to the cause of his death? [5]

A. Yes.

Q. What did you determine was the cause of his death?

A. Acute anemia for internal hemorrhage.

Q. Did you formulate an opinion as to the approximate time that Doctor Young D. Hahn had been dead when you saw the body?

A. Well, just approximately.

Q. What was your opinion?

A. Well, he died about, oh, eight o'clock, eight p.m.—no, no, this was later. About ten. I don't remember exactly the hour, you see.

Q. Well, Doctor, in order to refresh your memory I can show you the autopsy report, if that will refresh your memory.

By Mr. Maddox: Just a minute, Mr. Templeton, before we go into the autopsy report. Are you having him to testify as a witness who does not have present recollection?

(Deposition of Dr. Gustavo Arevalo.)

By Mr. Templeton: Yes.

By Mr. Maddox: He is going on past recollection?

By Mr. Templeton: He is going to refresh his memory if he desires to refresh his memory. I want to show him for the purpose of doing so, this autopsy report.

By Mr. Maddox: I think some foundation should be laid.

Q. Doctor, do you recall at the present time what the time of death was as given in your autopsy report?

A. I perform lots of autopsies, I couldn't keep in [6] mind the exact hour of every one, you see.

Q. And in order to refresh your memory, would it be necessary that you refer to the autopsy report that you made?

A. Well, whatever the report says, that is what it was copied on that day, you see.

Q. Well, Doctor, I show you a document here called, "Certificado De Autopsia," and I will ask you if you recognize—this is a photostat—and I'll ask you if you recognize that?

By Mr. Maddox: Before you show him that, I have a copy of it here, have we established that he does not have present memory?

By Mr. Templeton: I think he said he did not. Doctor, do you remember at the present time what your report was as to the time of death, approximate time of death of the party? Do you have a present memory of that as to what the time was?

(Deposition of Dr. Gustavo Arevalo.)

A. It was night time, but I don't remember the exact hour, could be about ten o'clock in the night.

Q. Doctor, I show you, ask you if you recognize this document?

By Mr. Maddox: Now, before you show him the document, Mr. Templeton, let's find out when this document was made and the circumstances, before we use that to refresh his memory.

Q. Doctor, did you make a certificate of the autopsy [7] record for your governmental offices in Mexicali with respect to each of these parties?

A. Did I make what?

Q. Did you make an autopsy report?

A. Yes.

Q. And when was that autopsy report—well, first, when did you make the autopsy itself?

A. Well, usually we saw the bodies the next day of some accident, you see.

Q. And then is the report written up immediately, or is it——

By Mr. Maddox: (Interrupting) I'll object to that as not being responsive. He gave his usual pattern. I wish to get a direct answer to this particular report.

Q. Doctor, did you make this report up at the time when you first viewed the body, or did you make it up at a subsequent time?

A. I write the report the same day.

Q. All right. Doctor, I show you this document and ask you if you recognize this document?

A. Yes.

(Deposition of Dr. Gustavo Arevalo.)

Q. And what is it? A. Autopsy report.

Q. That is a photostatic copy of the autopsy report? A. Yes.

Q. Now, I will ask you, doctor, if you can refer to [8] that report and refresh your memory and tell me, if you can, the approximate time, in your opinion, that Doctor Young D. Hahn passed away?

A. (Indicating) Right here, April 19 at twenty hours.

Q. And this is a true copy of the report as made by you? A. Yes.

Q. And is your signature thereon?

A. Right here.

Q. I will offer this for the purpose of identification. Mr. Maddox, you have a copy of it and may I have it marked?

By Mr. Maddox: Yes.

(Document was so marked.)

By Mr. Maddox: Now, may I take him on voir dire on the use of this document as to the foundation for it?

By Mr. Templeton: As to the foundation only?

By Mr. Maddox: Yes.

By Mr. Templeton: Go ahead.

Voir Dire Examination

Q. (By Mr. Maddox): Doctor, you said you made this document the same day as you made the autopsy, is that right? A. Yes.

Q. You made your report out the same day?

A. The same day, yes.

(Deposition of Dr. Gustavo Arevalo.)

Q. How close in time was it, how long after the actual [9] autopsy was it when you made the document? A. How long?

Q. Yes. A. The next day.

Q. The next day? A. Yes.

Q. You performed the autopsies on the bodies on one day, then the following day you made the report? A. Yes.

Q. Then you do not mean you made the report the same day as the date of the autopsy?

A. We perform the autopsy, you see——

Q. Yes.

Q. And keep the record. And then the lawyer call and ask for the report and we send it, see, that is the usual way we do.

Q. Well, I'm not asking the usual way, I am trying to see what you can recall about this report and this particular autopsy. Now, is it your testimony that you made this report the day after the day that you made the autopsy? A. Yes.

Q. And did you write it up that day in the same form as it appears here? A. Yes.

Q. Did you sign it on that same day?

A. Signed it the next day. [10]

Q. The day after you performed the autopsy?

A. Yes.

Q. Now, you say you performed the autopsy on the 19th? A. 19.

Q. And you wrote the report up on the 20th?

A. 20th or 21st, yes, because I think it was

(Deposition of Dr. Gustavo Arevalo.)

Sunday. I don't remember, it was a holiday, you know.

Q. It was a holiday? A. Yes.

Q. And the same day you wrote it up you also signed it that day? A. Yes.

Q. Was it signed by anyone else other than yourself? A. Yes.

Q. Another doctor is also required to sign it?

A. Yes.

Q. Who was that doctor?

A. Doctor Basquez Gomez.

Q. And you say it was on a Sunday?

A. Yes.

Q. When you actually made this?

A. Of course, I cannot remember, we performed lots of autopsies, you see.

Q. Yes, of course. Now, did you sign it before any witness or Notary Public, do you recall that?

A. Yes. [11]

Q. You did? A. Yes.

Q. Still this was done on the same—on the day after you made the autopsy? A. Yes.

Q. Now, I want you to look at this document and observe the date on it, the date that immediately precedes your signature. What date does it say there? A. 22 of April, 1953.

Q. Is that the date you actually made this up?

A. Yes.

Q. Then that is the day following the day that you made the autopsy, is that not true?

A. We make the autopsy April 19.

(Deposition of Dr. Gustavo Arevalo.)

Q. Yes, but you said the day after you made the autopsy——

A. (Interrupting): Well, you are a lawyer, no?

Q. Well, just a minute, answer my question. Listen to my question carefully now. It is your testimony that you made the autopsy one day and you made the report the following day?

A. Yes.

Q. That is true. Now, the date on the report is April 22nd, that is the date that you signed this document? A. Yes, whatever——

Q. (Interrupting) That is the date you prepared it? [12-A]

A. Whatever it say here, that is what happened.

Q. That is what happened. All right. Then that means you made the actual examination of the body on the 21st, does it not? A. Yes.

Q. All right. Now, at the time you performed the autopsy on the 21st, did you make any notes, any pencil notes? A. Yes.

Q. Any kind of notes as to what your discoveries were? A. Yes.

Q. Do you have those notes with you?

A. No, we just, you know, just like the memorandum, no, you know what I mean.

Q. Yes. A. That's all.

Q. What did you do with those notes?

A. We throw it away, we don't need it.

Q. How long did you keep those notes?

A. Oh, I would say a week, no.

Q. And at the time you made this autopsy re-

(Deposition of Dr. Gustavo Arevalo.)

port what did you rely on for the information that you have here? Were you relying on your memory?

A. No, no.

Q. What did you rely on?

A. The memorandum papers. [12-B]

Q. You relied on the notes? A. Yes.

Q. How many autopsies did you do on the 21st?

A. Oh, I could not remember.

Q. You don't know whether you did just those two, or whether you did more than two?

A. Maybe just two.

Q. You say maybe just two? A. Yes.

Q. You are not sure? A. I am not sure.

Q. Did you make the autopsy personally, yourself? A. Yes.

Q. Or did the other doctor make it?

A. Me, personally.

Q. You made it personally? A. Yes.

Q. Did anyone assist you in making this autopsy? A. Yes.

Q. Who was that?

A. Some fellow that helped over there.

Q. Is he a doctor?

A. No, he just takes care of the bodies, you know.

Q. I see. Did Doctor Gomez help you in any way? A. No.

Q. Was he present at the time this autopsy was made? [13] A. Yes.

Q. Was he in the same room with you?

A. We are both legal doctors, you know.

(Deposition of Dr. Gustavo Arevalo.)

Q. Yes. That was not my question. My question was whether or not Doctor Gomez was in the same room with you at the time you made the autopsy?

A. No.

Q. He was not? A. No.

Q. Did he assist in any way in the making of this autopsy?

A. There is two doctors, you know.

Q. Yes.

A. And one takes one week and one takes the other one.

Q. Yes. A. So we both signed the papers.

Q. I see. Now, his signature does not indicate—does not mean that he was actually present at the time of the autopsy was made? A. No.

Q. Do you know whether or not Doctor Gomez inspected the bodies or examined the bodies at all?

A. I don't know.

Q. You don't know whether he did or not. And your estimate—strike that. No other questions. [14]

Direct Examination—(Continued)

Q. (By Mr. Templeton): Doctor, were you requested to rush this autopsy through so that the bodies could or could not be taken to the United States? A. Yes.

Q. And who talked to you about that, about getting the autopsies through?

A. Somebody in the Consulate.

Q. And did you at any time talk to this gentleman here (indicating)? A. No.

(Deposition of Dr. Gustavo Arevalo.)

Q. Will you tell me what his name is?

By Mr. Maddox: William Hahn.

Q. And, Doctor, was the autopsy performed—do you know whether or not it was or was not a holiday upon which the autopsy itself was performed? A. I think it was a holiday.

Q. Well, by holiday do you mean—

A. (Interrupting) A Sunday.

Q. A Sunday? A. A Sunday.

Q. Then I call your attention to the calendar for the year 1953. March 18th is on a Saturday—I mean, April 18th is on a Saturday and April 19th is on a Sunday. A. Yes. [15]

Q. Now, with reference to the calendar, does that refresh your memory as to the date that you actually made the autopsy itself?

A. I think I made it Sunday, the 19th.

Q. And the report, then, was written up by you on the 22nd of April? A. Yes.

Q. Doctor, did you also at that time view the body of a child, Herbert Huxley Hahn?

A. Yes.

Q. And did you determine what, if any, injuries that he sustained?

A. Well, it is in the report, too.

Q. Well, do you recall exactly what the injuries were that he sustained? Do you have an independent recollection of it or must you refer to the autopsy report?

A. I'd have to refer, because I don't remember, you know.

(Deposition of Dr. Gustavo Arevalo.)

Q. All right, Doctor, I show you a document and I will ask you if you can tell me what this document is?

A. That is an autopsy report, too.

Q. Is that a photostat of the autopsy report you made in regard to the body of Herbert Huxley Hahn?

A. Yes.

Q. And that bears your signature?

A. Yes. [16]

Q. And dated April 22nd of 1953?

A. Yes.

Q. Doctor, now——

By Mr. Maddox: (Interrupting) I'd like to question him on this one also.

Q. Let me finish first, I will question him on it. Doctor, was this autopsy performed on the same date as the autopsy was performed on the body of Doctor Young D. Hahn?

A. Yes.

Q. And under the same conditions?

A. Yes.

Q. And were the same parties present?

A. Yes.

Q. That you have testified were present when you performed the autopsy on Doctor Young D. Hahn's body?

A. Yes.

Q. Now, Doctor, will you refer to this and tell me—if you need to refer to it to refresh your memory.

By Mr. Maddox: Before you show it to him, Mr. Templeton, I'd like to question him on it.

By Mr. Templeton: All right.

(Deposition of Dr. Gustavo Arevalo.)

Voir Dire Examination

Q. (By Mr. Maddox): Now, Doctor, did you prepare this report in the same fashion as you prepared the other report on your examination of the body of Doctor Young D. Hahn? [17]

A. Yes.

Q. By that I mean did you make notes at the time you made the examination of Herbert's body?

A. Yes.

Q. And you later used those notes as basis for your report? A. Yes.

Q. And does this report contain everything that was in your notes? A. Yes.

Q. Are there any other findings that you relied upon other than what is in your report?

A. No.

Q. This is your complete examination?

A. Yes.

Q. Now, I will call your attention to the date on which this is signed. What is the date as you see it there? A. 22 of April.

Q. 1953? A. Yes.

Q. And that is the date on which this report was actually made up? A. Yes.

Q. Now, did you also make this report the day after you actually made the examination?

A. Yes. [18]

Q. You made the examination one day and you made the report the following day? A. Yes.

Q. Now, I think the bodies were brought into

(Deposition of Dr. Gustavo Arevalo.)

the hospital about the 18th or the 19th, were they not? A. Yes.

Q. Now, the bodies were actually there for two or three days, from the 18th or 19th, up until the 21st, before you actually made the autopsies, is that not true? A. No, they came the 18th.

Q. Yes.

A. And I performed the autopsies the next day, the 19th, was a holiday, the Sunday.

Q. Well, you said you performed your autopsy the day before—look back to your signature as to the date here, the 22nd. Now, you said you actually—you are sure this date is correct and your signature is correct, are you not? A. Yes.

Q. You are sure, then, it was on the 22nd when you made this report? A. Yes.

Q. Is that your writing there, the 22nd?

A. Yes.

Q. That is your own handwriting?

A. I put the date of the day that I made the document.

Q. Made the document? [19] A. Yes.

Q. Yes. And you made the document the day after you made the examination?

A. I made it the 22nd.

Q. Yes, I understand that you made it on the 22nd. And at the time you made the document your memory of the autopsy was still fresh in your mind, was it not? A. Yes, of course.

Q. You had just done the autopsy the day before? A. Yes.

(Deposition of Dr. Gustavo Arevalo.)

Q. On the 21st? A. Yes.

Q. Now, the bodies had been there in the hospital for at least two days at that time, had they not? A. Yes.

Q. They were there for at least two days?

A. I keep the note of the autopsy, you know, until the lawyer in, until the administrator, policia.

Q. You say the administrator of the police?

A. Yes.

Q. All right. It is your testimony that you made this document, then, on the day that you have written there, the 22nd? A. Yes.

Q. That you made the autopsy just the day before? A. The 19th. [20]

Q. On the 19th? A. Yes.

Q. Well, the 19th, now, is not the day before the 22nd, Doctor?

A. Well, I don't know, of course, it is not.

Q. But you did say the bodies had been there for at least two days?

A. That was a special case, you see.

Q. Do you actually remember which day you actually made the autopsy? A. The 19th.

Q. Or not? A. The 19th.

Q. Do you have a record to show that?

A. Oh, no.

Q. You have no record to show that?

A. No.

Q. You are depending on your memory now?

A. No, I take notes.

Q. Well, do you have those notes?

(Deposition of Dr. Gustavo Arevalo.)

A. What it says here, April 19.

Q. Yes. A. Yes.

Q. Now, is the date and time that you have here, is that date and time you actually made the autopsies? A. Let me see. [21]

Q. You refer to April 19, which is on a Sunday?

A. Yes.

Q. April 19th at 23 hours? A. Yes.

Q. Now, that is the date you actually made the autopsy, is that right?

A. No, I made the autopsy the April 19.

Q. Well, that is the date that is written in here, is that what you are referring to?

A. That is the date and hour of the death here.

Q. Which is April 19.

A. April 19. Of course, this is approximate, see, it is not sure, you see.

Q. Yes. Well, you haven't any record anywhere of the date upon which you made the autopsy, do you? A. No.

Q. Did you write that down anywhere?

A. Yes.

Q. Where did you write it?

A. Note paper.

Q. And you have destroyed those papers?

A. Yes.

Q. You have no present memory of what you wrote on that paper now, do you? A. No.

Q. You have to refer to this document to refresh your memory? [22] A. Yes, of course.

Q. Then, you are not sure, absolutely sure of

(Deposition of Dr. Gustavo Arevalo.)

the date on which you made the autopsies, are you?

A. Well, I am sure because I am see the dates here, you see.

Q. Well, you did say you had made it the day before this document was signed?

A. Well, this is a special case, you see, because they called me in Sunday; I usually don't do nothing, you see.

Q. Yes.

A. But they call that it was somebody they want to take to the United States.

Q. Yes.

A. And they want to have the autopsy.

Q. What time of day was it when they called you? A. Oh, I don't remember.

Q. What time of day was it when you made the autopsy? A. I don't remember.

Q. Was it in the morning or in the night?

A. I think it was night.

Q. It was dark?

A. Yes. I don't remember for sure, you see.

Q. And you are sure when you have April 19th at 23 hours on this document, referring to Young D. Hahn—or is it Herbert Hahn. 23 hours as to Herbert Hahn, that date and time does not refer to the time the autopsy was made? [23]

A. No.

Q. That referred to the time of death?

A. Of death.

Q. According to your opinion? A. Yes.

Q. Then, it is your opinion that the death oc-

(Deposition of Dr. Gustavo Arevalo.)

curred on the same day as you made the autopsy?

A. Yes.

Q. And that was on a Sunday? A. Yes.

Q. It was your impression that the death had occurred just a few hours before the autopsy, would you say? A. Yes.

Q. Just a few hours before you actually examined the body? A. After, not before.

Q. I mean death had occurred a few hours before you made the autopsy? A. Yes.

Q. Were the bodies still warm? A. No.

Q. They were not warm? A. No.

By Mr. Maddox: All right. [24]

Direct Examination—(Continued)

Q. (By Mr. Templeton): Doctor, were you requested by—I understand you testified that you were requested by the American Consul to hurry your work up on the autopsies so that they could take the bodies back to the United States, is that correct? A. Yes.

Q. And you are sure that that was done on Sunday, April 19th? A. Yes.

Q. I will offer this, I mean, I ask this be marked for identification.

(The document was so marked.)

Q. Now, Doctor, referring to the report, the autopsy report which you have identified, will you refer to that report, then, if you must do so—must you refer to this report to refresh your memory as to what the cause of death was?

(Deposition of Dr. Gustavo Arevalo.)

A. Right here.

Q. No, I mean, must you refer to the report? You have to refer to the report to refresh your memory?

A. Of course, yes.

Q. All right. Now, will you refer to the report and tell in your opinion what was the cause of death of Herbert Huxley Hahn?

By Mr. Maddox: Now, let me interpose an objection. [25] We can go ahead, but I want the record to show that I am going to object to any testimony given by him based on the use of that report on the ground improper foundation has been laid.

By Mr. Templeton: And it is understood that we are making all objections because of the fact that we will not be able to——

By Mr. Maddox: And have them ruled on.

By Mr. Templeton: And have them ruled on by the Court.

By Mr. Maddox: Yes. Go ahead.

A. Acute anemia from an internal hemorrhage.

Q. (By Mr. Templeton): Doctor, what was the condition of the body of Herbert Huxley Hahn when you first saw it?

A. How was its condition?

Q. Yes, what injuries were you able to see visually? In other words, were there any bruises on the body, on the face?

A. Contusions, a contusion in here (indicating).

Q. In the head?

A. Front, here (indicating).

Q. On the front of the cranium?

(Deposition of Dr. Gustavo Arevalo.)

A. Yes, contusion.

Q. And what else did you observe with regard to his body? A. Externally, you say?

Q. Yes. [26] A. Nothing else.

Q. Doctor, were there any cuts on the body that you observed? A. No.

Q. Was his jugular vein cut at all?

A. Jugular vein?

Q. Yes. A. No.

Q. And the hemorrhage that you testified to, was that internal hemorrhaging?

A. Internal hemorrhage.

Q. Doctor, as the result of your examination of the body of Herbert Huxley Hahn, the child, did you form an opinion as to the cause of his death?

A. Yes.

Q. What was that cause of death?

A. Acute anemia from internal hemorrhage.

Q. Did you formulate an opinion as to the approximate time that Herbert Huxley Hahn had passed away?

A. Well, it is here, too, right approximately at 23 hours.

Q. Doctor, from examination of the two bodies were you able to—do you have an opinion—withdraw that question. Doctor, you have testified that in your opinion Doctor Young D. Hahn passed away at April 19th at 20 hours, and that the boy, Herbert Hahn, passed away on April 19th at 23 hours? [27] A. Yes.

(Deposition of Dr. Gustavo Arevalo.)

Q. What is the medical basis of your opinion as to the difference in the time of their deaths?

A. Well, especially the rigor mortis.

Q. In other words, the condition of rigor mortis?

A. Yes.

Q. Of the two bodies?

A. And the decomposition of the bodies, too.

Q. Was there anything else?

A. Besides—what do you say?

Q. Well, besides those two things, the decomposition of the bodies, the state of decomposition, and the state of rigor mortis, was there anything else upon which you based the difference of three hours in the time of their respective deaths?

A. Well, asking the police—the body of the Doctor came later, came first to the boy, you know.

Q. The boy came in first? A. Yes.

Q. All right, Doctor, you—I don't quite understand your answer. The question was, other than the state of decomposition of the bodies and of the condition of rigor mortis, was there any other reason that you determined that Doctor Young D. Hahn had passed away about three hours prior to the boy?

A. Of course, my appreciation is all in the medical [28] way, you know.

Q. That's right.

A. Just the rigor mortis, decomposition, the temperature of the body, the nature of the wound.

Q. And were the wounds sustained by Doctor Hahn more severe or less severe than the boy's?

(Deposition of Dr. Gustavo Arevalo.)

A. Oh, more severe, yes.

Q. Well, to what extent were they more severe?

A. Well, the hemorrhage, bigger.

Q. And were the contusions any different on the body of Doctor Hahn? A. Yes.

Q. Than they were upon the boy?

A. Yes.

Q. What was the difference?

A. He had a big open wound in the head.

Q. A big open wound in the head?

A. Yes.

Q. And did the boy have any open wounds?

A. No.

Q. I mean to the head? A. No.

Q. Doctor, from the injuries which you ascertained were upon the body of Doctor Young D. Hahn, do you have an opinion as to whether or not those injuries would have or would not have caused immediate death? Do you have any [29] opinion on that? A. No.

By Mr. Maddox: Doctor, would you please answer "yes" or "no", rather than shake your head, so it can be written down?

A. I said "no".

Q. In other words, you did not know whether Doctor Hahn died instantly or some time after the accident? A. No.

Q. Doctor, in your capacity as Autopsy Surgeon, do you know whether or not it is or is not permissible for bodies of persons who have been injured

(Deposition of Dr. Gustavo Arevalo.)

on the highway to be moved to the hospital before the Ministerio Publico sees the body?

A. Well, I don't know——

By Mr. Maddox: (Interrupting) I will object to that as a conclusion.

A. I don't know the law, you know, I am no policeman.

By Mr. Templeton: You may cross-examine.

Cross Examination

Q. (By Mr. Maddox): Now, going back to your examination of the boy, Doctor? A. Yes.

Q. I think you testified when you examined him you found—let's see—you found contusion on the head? [30] A. Yes.

Q. The front of the head? A. Yes.

Q. What do you mean by "contusion"?

A. A contusion is a—well, a contusion is a contusion, you know. You know, a contusion is a—when you hit someone, it is no open wound, you know.

Q. I see. A contusion is not the same thing as a fracture, is it? A. Oh, no, of course not.

Q. A fracture means that the bone is broken?

A. Break.

Q. A break in the bone? A. Yes.

Q. A contusion is an injury to the skin, is it not? A. Yes.

Q. Now, when you examined the body of the boy you found a contusion? A. Yes.

(Deposition of Dr. Gustavo Arevalo.)

Q. And, Mr. Templeton asked you what else you found and you said nothing else, is that right?

A. Not open, no, a hemorrhage, you know.

Q. The hemorrhage was internal, was it not?

A. Internal, yes.

Q. Yes. So you didn't see anything else when you examined him? [31] A. Externally?

Q. Yes. A. No, just the contusion.

Q. I see. What does the word "contuding" mean, do you know? I ask you to refer to your report there? A. Contuding?

Q. Refer to your report on Herbert Huxley Hahn, and you have——

By Mr. Templeton: (Interrupting) Which page, Counsel?

Q. Is this the boy? A. Yes.

Q. Do you have something called "external appearance"? I don't know the translation of it.

A. Let me see.

Q. Right after identification, right here (indicating). A. Yes.

Q. Now, that is "external appearance," is it not?

A. Yes.

Q. Now, under that you have——

A. (Interrupting) You say this is contusion?

Q. No, contuding trama of the front perietal region. A. Yes.

By Mr. Templeton: Counsel, I am going to object to that, as you are reading from the translation and not from the original document from which he is testifying.

(Deposition of Dr. Gustavo Arevalo.)

Q. Well, he has the original document and I am asking [32] him to explain what is the meaning.

A. Well, in common words, "hit here".

Q. Now, look over further in your report. Don't you have on the report a fracture at the base of the skull?

A. Yes, right here.

Q. Right here. So you did find a fracture of the skull on the boy?

A. When we opened the skull up, no.

Q. That fracture was not obvious on the external examination?

A. Oh, no, it is in the base of the cranium, you know.

Q. I see.

A. It says here the base of the cranium.

Q. Yes, I know it is the base of the cranium, and that was not obvious until you actually cut through the skin?

A. No.

Q. It was not a compound fracture?

A. No.

Q. When you examined his chest, refer to your report and tell me what you found upon examination of his chest, thorax, thoracic examination?

A. Same thing, contusion of the thorax.

Q. And what is a thorax?

A. The chest.

Q. And did you—when you examined the skull of the boy after you cut through the skin and examined the skull, [33] you found a hemorrhage in the basal portion of his skull, did you not?

A. Yes.

(Deposition of Dr. Gustavo Arevalo.)

Q. So you found hemorrhage in his head as well as internally in his body? A. Yes.

Q. Now, then, you give the cause of death. Is it not possible that the hemorrhage in the basal region of the skull and the fracture of his skull could have contributed to his death?

A. Yes. Of course, yes.

Q. Is it not possible that that type of injury with the resulting hemorrhage can cause immediate death? A. Well, no.

Q. It is not possible?

A. Well, it is possible, everything is possible in medicine, you see.

Q. Well, that is all I am asking. It is possible that immediate death can result from that type of injury?

A. Yes. It all depends where is the lesion, you know what I mean, the wound or the trama.

Q. Yes. Now, you said that you based your opinion as to the time of death on, number one, the condition of rigor mortis; number two, on decomposition, and then the nature of the wound and temperature? A. Yes. [34]

Q. Those were the things you based your opinion on? A. Yes.

Q. Do you know what the temperature of the body was at that time? A. No.

Q. Did you make a note of the temperature?

A. No.

Q. Did you take the temperature of the bodies?

A. No.

(Deposition of Dr. Gustavo Arevalo.)

Q. You did not? A. No.

Q. Then the temperature of the body was not a basis of—— A. (Interrupting) No.

Q. I am talking about the temperature.

A. No. Well, if you touch the body it is cold, or it is a little warm, you know, the natural temperature of the body.

Q. You are depending on the feeling through your own hands, not through any clinical measuring device? A. No.

Q. All right. Now, you mentioned the state of decomposition of the bodies as the basis for your opinion? A. Yes.

Q. Will you check the report which you have on Herbert Hahn and tell me what the report shows as to the decomposition [35] on Herbert Hahn? A. No decomposition.

Q. Shows no decomposition? A. No.

Q. I think it says, "no signs of decomposition," is that right? A. Yes.

Q. Now, check the decomposition on Doctor Young D. Hahn and tell me what that says?

A. No signs of decomposition.

Q. No signs of decomposition on either one, is there? A. No.

Q. Then we can rule out decomposition as the basis for your opinion, can we not?

A. Well, yes.

Q. There was no decomposition on either one?

A. No.

Q. Now, you referred to the nature of the

(Deposition of Dr. Gustavo Arevalo.)

wound. You say that you have no memory except what is recorded here as to your findings, is that true? A. Pardon me.

Q. You have no independent memory of what you found except what you have written down here?

A. Yes.

Q. Now, tell me what you found as to the injury to the head of Doctor Hahn? Do you know of a basal fracture of the skull? [36]

A. Listen, you got the explanation about this. Trama.

By Mr. Templeton: Do you want that? Trama of the parietal region?

A. This kind of lesion, you see, here you got a bulb here, you know.

By Mr. Templeton: Referring to the back of the head.

Q. Are you referring to a portion of the brain?

A. Yes.

Q. Yes, go ahead. Well, you found the basal fracture of the skull, did you not? A. Yes.

Q. And you found subdural hemorrhage?

A. Yes.

Q. You found the hemorrhage after you had cut through the skin? A. Yes.

Q. And you also found a fracture of the skull and subdural hemorrhage in the boy?

A. Yes.

Q. You found a trama of the thorax?

A. Yes.

Q. In the father? A. Yes.

(Deposition of Dr. Gustavo Arevalo.)

Q. And trama of the thorax and contuding trama in the son? A. Yes.

Q. And you found internal hemorrhage in the case of [37] each? A. Yes.

Q. Now, are those the findings that indicate to you the different times of death? A. Yes.

Q. Doctor, did you—answer me this: Did you examine these bodies independently and form an opinion as to the time that each one had been dead, or did you just examine them in trying to determine which one might have died first?

A. No, I just examined like some other people, you see.

Q. Yes. And did you examine each one independently and form an independent opinion as to the time he had been dead? A. Yes.

Q. And because of the temperature of the bodies you felt that death had only been a matter of hours? A. Yes.

Q. And you don't know what time of day it was when you made this examination?

A. No, sir, night I tell you, I don't remember, night or morning, I don't remember.

Q. You don't remember. I see.

A. It is almost a year.

Q. Yes. And when you first saw the bodies, they were there at the hospital, were they not, they had already been brought there? [38] A. Yes.

Q. And this was on the 19th? A. Yes.

Q. A few minutes ago Mr. Templeton asked you about the contusions on the face of Doctor Hahn

(Deposition of Dr. Gustavo Arevalo.)

and he asked you were they severe and you said, yes they were severe because they caused the death. Now, is it your opinion that the death of the Doctor was caused by injury to his face?

A. No, to the skull.

Q. To the scalp and to the skull?

A. Yes.

Q. And I think your report says that his death was caused by acute anemia from internal hemorrhage? A. Yes.

Q. Well, does that not refer to the injury to the chest area?

A. Yes, but both, he has a big subdural hemorrhage.

Q. I see. A. Yes.

Q. And so the cause of death of each the father and the son was contributed to by the injuries to his head? A. Yes.

Q. How long have you been making autopsies, Doctor? A. Six years.

Q. Six years in Mexicali? A. Yes. [39]

Q. Did you make or perform autopsies when you were in Mexico City? A. Yes.

Q. And for how long did you perform autopsies there? A. Two years.

Q. You received your degree in medicine in Mexico City? A. Yes.

Q. What is the name of the school?

A. Medical Army School in Mexico City.

Q. Medical Army School? A. Yes.

Q. How many years were you in training there?

(Deposition of Dr. Gustavo Arevalo.)

A. Six years.

Q. And when did you receive your degree?

A. 1940, December 5, 1940.

Q. And what did you do after that?

A. Intern.

Q. Where did you intern?

A. Mexico City Military Hospital.

Q. For how long? A. One year.

Q. Then after that what did you do?

A. I came to one army regiment.

Q. Did you go into practice at that time?

A. Yes.

Q. After six years medical school and one year internship? [40] A. Yes.

Q. Prior to your six years medical school what training had you had?

A. Well, training in surgery in Saint Mary's Hospital in Tucson, Arizona.

Q. Before you went to medical school you had training in surgery? A. Yes.

Q. In Tucson, Arizona? A. Yes.

Q. At Saint Mary's Hospital? A. Yes.

Q. Had you ever been to medical school before that? A. To the medical school?

Q. Had you ever been to medical school before you had your training in Tucson?

A. Postgraduate course in Mexico City.

Q. You had your training in Tucson before you trained in Mexico City? A. No, after.

Q. Well, you must have misunderstood my question. My question was, what training did you have

(Deposition of Dr. Gustavo Arevalo.)

before you entered medical school in Mexico City?

A. What training?

Q. Yes. [41]

A. I went to the high school in Mexico.

Q. To high school?

A. And then to the University of Mexico.

Q. Well, you had training at the University of Mexico before you entered medical school?

A. It is an operation in here in the United States, you go to grammar school first, no?

Q. Yes.

A. Then you go to high school, no?

Q. Yes. A. Then you go to college?

Q. Right.

A. Then you go to the professional school?

Q. That's right.

A. Same thing in Mexico.

Q. Did you go to the University of Mexico for college work prior to entering medical school?

A. Yes.

Q. And did you get a degree from the University of Mexico? A. Yes.

Q. What is it called?

A. We call it Bachelor.

Q. That is the same as a Bachelor degree here?

A. Yes.

Q. So you have a Bachelor degree, then you have a [42] medical degree? A. Yes.

Q. Now you are presently employed as an Autopsy Surgeon, are you not?

(Deposition of Dr. Gustavo Arevalo.)

A. Not any more, I resigned about a month ago.

Q. But you were on the 19th of April of last year? A. Yes.

Q. And that is in Mexicali? A. Yes.

Q. I want to get closer, if I can, Doctor, to the time of day when you made this examination. Now, you say you are sure it was on a Sunday?

A. Yes.

Q. Do you remember anything else you did on that day? A. No.

Q. And according to the date that document was signed, it was on a Wednesday when you actually prepared the autopsy report? A. Yes.

Q. Now, Doctor, it is three days from Sunday to Wednesday. You said a few minutes earlier that you made the autopsy report on just the day before you—I mean, you made the actual autopsy examination on just the day prior to signing this paper?

A. Yes.

Q. I want to ask you this: It is your usual custom to [43] write up your report the day after you make the actual examination? A. Yes.

Q. And it was your first testimony that you did actually write it up the day after you made the examination, isn't that true? A. Yes.

Q. But now you change your story and say you made the examination on a Sunday and wrote it up three days later. Are you sure of that?

A. I don't remember, it was a long time ago.

(Deposition of Dr. Gustavo Arevalo.)

Q. Yes. It is quite possible that you made this examination on the 21st, is it not? A. No.

Q. You are sure it was on a Sunday?

A. Yes.

Q. But you can't remember anything else you did on that day? A. No.

Q. Can you remember whether or not you made this examination before you ate dinner that evening, or after dinner?

A. Oh, I don't know, I couldn't tell you.

Q. You couldn't tell?

A. No, I don't remember it.

Q. You do remember it was at night?

A. Yes. [44]

Q. Do you know whether or not it was before midnight or after midnight?

A. No, I don't remember.

Q. Did you talk with anyone on that day, Doctor, anyone who—strike that. I think Mr. Templeton asked you, did you see Mr. Hahn here on that day?

A. No.

Q. You didn't see him?

A. No. That is the first time I saw this gentleman (indicating).

Q. Did you talk to anyone that may have come down from Los Angeles that day to see about the accident or to see about the——

A. (Interrupting) No.

Q. You didn't talk to anyone on the day you made the examination? A. No.

By Mr. Maddox: I have no other questions.

(Deposition of Dr. Gustavo Arevalo.)

Redirect Examination

Q. (By Mr. Templeton): Doctor, one or two questions. Do you recall what the—do you recall or not Doctor Hahn was a caucasian or an oriental, or what? A. Did I know what?

Q. Do you recall whether or not the body of—that Doctor Hahn, whose body you examined, do you recall whether [45] or not that body was a body of a caucasian or of an oriental?

A. It is right here, “Nationality, Korean.”

Q. Nationality Korean? A. Yes.

Q. Now, Doctor, the fact—does the fact that the body of Doctor Young D. Hahn was a Korean, does that assist in refreshing your memory as to the facts that you have testified to?

A. Well, of course, yes.

Q. Do you have—have you performed the autopsy of many Koreans? A. No.

Q. And——

A. (Interrupting) The first one.

Q. That was the first one? A. Yes.

By Mr. Templeton: That’s all.

By Mr. Maddox: That’s all. [46]

State of California,
County of Imperial—ss.

I, M. Gayle Amack, a notary public within and for the County of Imperial, State of California, do hereby certify:

That prior to being examined the witness, Gus-

tavo Arevalo, was sworn by me to testify to the truth, the whole truth and nothing but the truth;

That the said deposition was taken down by me in shorthand at the time and place herein stated and was thereafter reduced to typewriting under my direction;

I further certify that it was stipulated by and between counsel for the respective parties hereto that the signature to said deposition be waived, and that it shall possess the same force and effect as though read and signed by the said witness.

Witness My Hand and official seal this 4th day of March, 1954. My notarial commission expires March 8, 1957.

[Seal] /s/ M. GAYLE AMACK

Notary Public in and for the County of Imperial,
State of California.

[Endorsed]: Filed March 5, 1954.

[Title of District Court and Cause.]

DEPOSITION OF CELESTINNO LUPERCIO PEREZ

Appearances: For S. D. Hahn: Edward Carter Maddox, Attorney at Law. For Sarah E. Padre: Templeton and Miller, Attorneys at Law, by Harry E. Templeton. [1*]

The deposition of Celestinno Lupercio Perez,

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

taken on behalf of Sarah E. Padre in Room 110, De Anza Hotel, in the City of Calexico, County of Imperial, State of California, commencing at approximately 11:20 o'clock a.m. on the 27th of February, 1954, before M. Gayle Amack, a notary public within and for the County of Imperial, State of California, pursuant to notice.

(Daniel Castillon, being first duly sworn to act as interpreter, translates the following proceedings from English into Spanish and from Spanish into English.)

By Mr. Maddox: Mr. Templeton, I'd like to ask the interpreter one or two questions. What is your name, please?

By the Interpreter: Daniel Castillon.

By Mr. Maddox: And you are to interpret from English into Spanish and from Spanish into English?

By the Interpreter: Yes, sir.

By Mr. Maddox: And are you in any way attached to the Court in this County?

By the Interpreter: No, but I have interpreted for the Assistant District Attorney, Traviss, in El Centro.

By Mr. Maddox: I see. You are not a part of the official Court staff of interpreters?

By the Interpreter: No, I am not.

By Mr. Maddox: Are you personally acquainted with any of the persons in this room today? [2]

By the Interpreter: No, except the man who hired me to interpret for him, Mr. Templeton.

By Mr. Maddox: Not with the witness:

By the Interpreter: No, not with the witness. I met the witness at the Comendancia; Headquarters, Police Headquarters, because I was supposed to pick him up.

By Mr. Maddox: What is your occupation?

By the Interpreter: I run a little taxi stand in Brawley.

By Mr. Maddox: All right, no other questions.

CELESTINNO LUPERCIO PEREZ

a witness produced on behalf of Sarah E. Padre, being first duly sworn to state the truth, the whole truth and nothing but the truth, testified on his oath through the interpreter, as follows:

Direct Examination

Q. (By Mr. Templeton): Will you state your full name? A. Celestinno Lupercio Perez.

Q. What is your occupation?

A. I am an employee of the Government.

Q. What is the nature of that employment?

A. I am employed by the Department of Patrol.

Q. Is that of the Police Department of Mexicali?

A. Yes, it is with the Police Department of Mexicali. [3]

Q. And what is your rank in the Police Department?

A. I am the Chief Officer of the Department Patrol.

Q. And on the 18th day of April—and on the 19th day of April, 1953, were you so employed by

(Deposition of Celestinno Lupercio Perez.)

the Police Department of Mexicali? A. Yes.

Q. And what was your position at that time?

A. I was a Corporal in the Patrol Department.

Q. And have you since been advanced?

A. Yes, I am an Officer.

Q. Well, is he a Lieutenant or a Captain?

A. I am a Lieutenant.

Q. On or about April 18th were you—what were your duties on or about April 18th, 1953?

A. I was a Patrolman of the City.

Q. And on that date were you in—were you using a Patrol car?

A. Yes, I was using a Patrol car.

Q. And were you alone or did you have a partner?

A. I was then with the Officer that was Manuel Wong Beltran.

Q. And on that date were you and your fellow Officer, or did you and your fellow Officer receive a call to go to the scene of an accident on the Mexicali-Tijuana Highway? A. Yes, sir.

Q. At about what time of day was it that you [4] received the call?

A. I returned around 1:30, so it must have been around 1:00 o'clock.

Q. And did you go pursuant to that call to the scene of on accident on Mexican Highway No. 2 between Mexicali and Tijuana?

By the Interpreter: Please repeat that question.

(The reporter read the last question.)

(Deposition of Celestinno Lupercio Perez.)

A. Yes.

Q. How did you receive the call to go to that accident?

A. Through the station of the Rumurosa.

Q. And did your partner go with you at that time? A. Yes.

Q. Approximately where on the Highway did this accident take place to which you received the call?

A. Are you referring to what part of the Highway?

Q. Yes, what part of the Highway?

A. It was right along the Laguna Salada.

Q. Do you know approximately how far it is from the City of Mexicali to the scene of the accident?

A. I don't recall very well whether we have that included in the report.

Q. When you got to the scene of the accident what, if any, vehicles did you find were involved in the accident?

A. The only car present was the Nash, where the [5] passengers collided with the equipment at the scene of the accident. And Mr. Luna's car was also there and ours.

Q. And was there any kind of machinery involved in the accident?

A. Yes, there was a cement mixer.

Q. Which direction on the Highway was the Nash headed? Toward Mexicali or toward Tijuana?

A. From Tijuana to Mexicali.

(Deposition of Celestinno Lupercio Perez.)

Q. And I understand you to say that there was the Nash, the cement mixer and the car, or which Luna was there?

A. When we got there Mr. Luna's car was there already.

Q. Did you have any conversation with Mr. Luna with regard to the accident?

A. No, all we did was get there and we pick up the lady and we drove away.

Q. When you arrived at the scene of the accident were there any other persons there besides the three injured persons and Senor Luna?

A. The only person we saw there was the lady.

Q. Did you see Senor Luna's partner?

A. No.

Q. Did you see anyone in the Nash automobile?

A. Just the person that was in the car and he stayed there.

Q. Did you later determine who the person was who was in the car? [6]

A. We didn't take any further data.

Q. Did you see a boy?

A. At the scene of the accident?

Q. Yes.

A. No, we saw him at the hospital.

Q. Do you know whether or not there was or was not a boy in the car at the time of the accident?

A. No, I can't identify that, but when we got to the hospital they told us that it was a boy that was in the car with the rest of the injured parties.

Q. Did you see the boy at the hospital?

(Deposition of Celestinno Lupercio Perez.)

A. Yes.

Q. Do you know how he got to the hospital?

A. Dead.

Q. Well, do you know how he was transported to the hospital?

A. People driving the private car of a Buick model.

Q. Do you know who the party was that was driving that Buick car?

By Mr. Maddox: Wait now, I am going to object to this. This calls for a conclusion and it is hearsay.

Q. Well, I am asking him if he knows. Well, I will withdraw the question. Did you see the Buick car, did you see it at the hospital—did you see the car that the boy had been brought to the hospital in?

A. Yes, and we took all of the information from the [7] owner of the car.

Q. And you talked with the man who had driven the car?

A. Naturally, so that I could get his address and his name.

Q. And was one of your duties as a Police Officer to take the information as to who was driving the car and what had been done with the body?

By the Interpreter: Please give me a repetition on that question.

(The reporter read the last question.)

A. Yes.

Q. And in carrying out your duties did you

(Deposition of Celestinno Lupercio Perez.)

determine the name of the person who was driving that car?

By the Interpreter: Please repeat that again.

(The reporter read the last question.)

A. Yes.

Q. What was his name?

A. It is written down in that paper, I can't remember.

Q. Do you have any independent recollection at this time as to the name of the person that was driving the car?

Q. What car, the one that was involved in the accident or the one that——

Q. (Interrupting) The Buick?

A. Yes, they live in Tijuana and they are written [8] down in the report.

Q. Well, did you make a written report in your Police records?

A. We didn't make a declaration, but we wrote down the report to the Police Department.

Q. Is this a document that I show you—is that an excerpt of the report as appeared upon the record of the Police Department that was made under your supervision?

By Mr. Maddox: Just a moment, I'd like to question him about this. May I have the question?

(The reporter then read the last question.)

By Mr. Maddox: You are asking him if this is an excerpt he made from the police report. All right, let him answer that.

(Deposition of Celestinno Lupercio Perez.)

Q. Read him the question again, please.

(Reporter then read the last question.)

A. Yes, that is the report of what is written at the Police Department.

Q. And do you know when this was made, do you know when this was prepared?

A. Are you referring to the report or to that?

Q. No, to this document?

A. It must have the date on it.

By Mr. Maddox: Let's hold it on the table, Mr. Templeton, I don't want him to refresh his memory from it until you lay the foundation for it. [9]

Q. Well, do you know whether or not this document was made within the last two weeks?

A. More or less, when it was requested.

Q. And—well, you can go ahead and question him if you want to.

By Mr. Maddox: Well, I'd just leave it here, I don't think any foundation has been laid. I am going to object to the use of it, though.

Q. All right. Mr. Lupercio, do you know—I show you this document to which I have referred, and I will ask you if by referring to this document you are able to give me the name of the party who was driving the Buick automobile?

By Mr. Maddox: Now, don't give it to him yet.

A. Yes.

Q. Will you refer to this document?

By Mr. Maddox: I will object to the use of that. You haven't laid any foundation to that document, and I will object to the use of it.

(Deposition of Celestinno Lupercio Perez.)

Q. All right, we'll go back a little further. Mr. Lupercio, at the time of the accident, or shortly after the accident, you made a report—or did you make a report in your Police records with respect to the accident to which I have—about which I have been questioning you?

A. That is the whole report.

Q. In other words, you did make the report?

A. Yes.

Q. And on or about the—or within the past two weeks you were requested to furnish an excerpt and furnish a record of that report? A. Yes.

Q. And do you have any independent recollection as to the name of the party that was driving the Buick, other than the records that were made by you at the time in your Police report?

A. No, I can't, it is all there.

Q. Now I show you——

By Mr. Maddox: (Interrupting) Let me ask him a question on this now.

By Mr. Templeton: All right.

Voir Dire Examination

Q. (By Mr. Maddox): Your name is Lupercio, is that right? A. Yes.

Q. And who is Captain Jorge Dominguez?

A. He is the new Commandant.

Q. Who was Commandant at the time you made your report? A. Jesus Maroquin Villreal.

Q. Did you make your report to your Commandant on the 18th of April?

(Deposition of Celestinno Lupercio Perez.)

A. Yes, everything has been taken care of. [11]

Q. And did you go back to the office and tell him just what you had observed out on the road?

A. Everything has to be written down.

Q. Well, who wrote it down, did you write it down or did someone else write it down?

A. We have the typist at the Headquarters that does the writing for us.

Q. Did you dictate your report to the typist?

A. Yes.

Q. And was that done on the same day that you observed these cars out on the Highway?

A. Immediately, right after.

Q. Immediately after. And have you had occasion to make any other reports since then?

A. Very many.

Q. Reports on this particular accident?

A. No, that is the only one.

Q. Have you had occasion to go back and read over the report at any time since you made it?

A. No, I haven't had any time, we just brought it out the other day.

Q. So two weeks ago was the first time you had seen the report since you dictated it to the typist?

A. Yes.

By Mr. Maddox: That's all. I object to it now on the ground that he didn't supervise the preparation of it. [12]

Direct Examination—(Continued)

Q. (By Mr. Templeton): Mr. Lupercio, after

(Deposition of Celestinno Lupercio Perez.)

this report was dictated to the stenographer and was written up by her, did you read it over?

A. Yes, once we have it dictated we have to read it to approve it.

Q. And you did read it, then you approved the report as written? A. Yes.

Q. And did you sign that report?

By the Interpreter: Yes, I signed it. Oh, excuse me, but he did say that he had signed it.

Q. Well, ask him the question. A. Yes.

Q. Now, I show you this report.

By Mr. Maddox: You can use it now, I have no objection to it.

Q. Will you mark this for identification, Number 3?

(The document was so marked.)

Q. Now, will you examine this report, Mr. Lupercio, and just read it over to yourself?

(Witness examines document.)

Q. Now, Mr. Lupercio, are you able to tell me the name of the driver of the Buick automobile that brought the boy to the hospital? [13]

A. Galdino Loza Cuevas.

Q. And did you talk to Mr. Cuevas at the hospital?

A. Yes, because I wanted his domicile and his name.

Q. And was anyone else with Mr. Cuevas in the Buick automobile that you know of?

A. Yes, a woman was with him.

Q. And did you ascertain from any source how

(Deposition of Celestinno Lupercio Perez.)

the boy was transported from the scene of the accident to the hospital?

A. Yes, they had him in the Buick car.

Q. And do you know whether or not he was alive or dead at the time he arrived at the hospital?

A. He arrived to the hospital dead.

Q. Did you ascertain from Senor Cuevas or from the woman that was with him approximately when the boy had died?

By Mr. Maddox: I will object to that, that calls for hearsay.

Q. I will withdraw the question. Was it, as a Police Officer, one of your duties to question the parties who brought in the body of the boy to the hospital?

By the Interpreter: Repeat that question, please.

(Reporter then read the last question.)

A. Yes.

Q. And in that capacity did you question them, question Mr. Cuevas as to when the boy died? [14]

A. No.

Q. Did he tell you when the boy died?

A. No, he didn't.

Q. Did you question the woman who was with him as to when the boy had died?

A. What woman?

Q. The woman in the car with Mr. Cuevas, in the Buick? A. No, we didn't ask them.

Q. Do you know whether or not the Buick had picked up the body of the boy and left the scene of the accident before you arrived?

(Deposition of Celestinno Lupercio Perez.)

By Mr. Maddox: Just a minute, I'll object to that, it calls for a conclusion. You're asking him whether or not he knows something happened while he wasn't there.

Q. I am asking him whether he knows, yes or no.

By Mr. Maddox: Yes, but such knowledge could only be gained by hearsay.

Q. All right, ask him to answer the question yes or no.

By Mr. Maddox: I'll object to that as it calls for hearsay. He cannot possibly know what happened when he was not there.

Q. Ask him to answer that yes or no.

By the Interpreter: Will you repeat the question, please, I got sidetracked again?

(Reporter read the last question.) [15]

A. When we got there the boy wasn't there any more.

Q. Did you have any conversation with Mr. Luna in which there was any discussion about whether or not the boy had or had not been sent to the hospital? A. No.

Q. Do you know what happened to the body of the man that was involved in the accident and who was riding in the Nash? A. No.

Q. Well, when you arrived at the scene of the accident was there a body of a man in the Nash car? A. Yes.

Q. Where was this body?

A. He was in the front seat of the car.

(Deposition of Celestinno Lupercio Perez.)

Q. What was the condition of the automobile in which the man's body was located?

A. It was all smashed in, the front, right door.

Q. Did you examine the body of the man?

A. No.

Q. Do you know whether or not the man was dead or not? A. No.

Q. Do you know whether or not the body of the man was ever taken to the hospital?

A. We didn't take any more data, some other authorities took care of him. [16]

Q. Why did not you take care of the body of the man?

A. Because that was none of our affair.

Q. Why wasn't it a part of their affair?

A. Because it has to do with the—I believe it is the District Attorney's Office.

Q. Why is the District Attorney's Office involved with a body of a man?

By Mr. Maddox: I'll object to this. The question has been asked and answered.

Q. No, it hasn't.

By Mr. Maddox: And you are calling for a legal conclusion as to an area in which he says he has nothing to do with, and he can't explain the operations of the D. A.'s Office, and if you ask him to, you are asking him for an opinion. He is not an expert.

Q. You have your objection. Will you ask him the question so he may answer? Will you read the question?

(Deposition of Celestinno Lupercio Perez.)

(Reporter read the last question.)

A. Because in all those cases he is the one who has to take care of them.

Q. Well, why did he take the body of the woman in and the body of the boy was taken by another car and no one took the body of the man in?

By Mr. Maddox: Objection, it calls for an opinion, calls for a conclusion.

A. The people we take for granted are dead we don't [17] fool with and we only give aid to the injured.

Q. Then had you determined that the man was already dead at the time you were at the scene of the accident?

A. Yes, we did because we saw him destroyed.

Q. Was the body of the man taken directly to the morgue? A. We don't know.

Q. Do you know whether or not the body of the man was ever taken to the hospital? A. No.

Q. He doesn't—you don't know, or is it the answer that you do not know whether it was taken there or that the body was not taken there?

A. All the bodies had to go, by law, to the hospital whether they were dead or alive.

Q. But the live bodies of persons that are live go to a different department at the hospital than those who are dead, is that not a correct statement?

By Mr. Maddox: I object to that, he is not a hospital official and he doesn't know the work of a hospital. A. The dead go to the——

By the Interpreter: I can't translate that, but

(Deposition of Celestinno Lupercio Perez.)

what he gave me he said it is a place where they take people that are dead, then they take others to the department where they treat them.

Q. And do you know of your own knowledge whether the [18] body of Dr. Hahn, or the man who was in the automobile was taken directly to the amphitheater?

By Mr. Maddox: I'll object to that, he said already he doesn't know. He has answered that question.

A. The child, I know he was taken directly to the hospital, the dead man I really don't know anything about him.

Q. When you left the scene of the accident was Senor Luna still there?

A. Yes, he remained there.

Q. Do you know whether or not—do you know who took care of the body of the man who was in the car? A. No.

Q. In your investigation of this accident did you determine approximately the time that the accident occurred? A. No.

By Mr. Templeton: Cross examine.

Cross Examination

Q. (By Mr. Maddox): Does your record there indicate the date that this accident took place?

A. Yes.

Q. And what was the date that it took place?

A. 18th of April.

Q. And when you saw the boy it was after

(Deposition of Celestinno Lupercio Perez.)

midnight and the morning of the 19th, was it not?

A. We saw him at the hour stipulated on that report.

Q. Well, I want to know if that was—ask him if that was after midnight of the 18th.

A. Well, our report reads that it was at 1:30, so it was at 1:30.

By Mr. Templeton: Is that a.m. or p.m., is it morning or night? A. In the morning, a.m.

Q. Where was the body of the boy the first time you saw it?

A. I saw them at the hospital when they dragged him—when they pulled him out of the car and took him inside the waiting room at the hospital.

Q. How long had you been at the hospital when the body of the boy arrived?

A. It must have been about ten minutes, because I was helping the nurse on the table where he was sitting there, you know, he was laying down and I was there helping her when they brought him in.

Q. It was your statement that at the time you arrived at the scene of the accident the body of the boy was not there, is that not true?

A. We didn't see him.

Q. How long did you remain at the scene of the accident?

A. We just stayed there long enough to get the woman [20] in the car.

Q. Would you say that was approximately ten minutes? A. No more or less.

(Deposition of Celestinno Lupercio Perez.)

Q. And did you drive directly to the hospital from the scene of the accident? A. Yes.

Q. How long did it take you to drive from the scene of the accident to the hospital?

A. It must have been about twenty minutes because we were speeding.

Q. How long—what is your estimate of the time it would take if you were not speeding?

A. About forty-five minutes.

Q. Did you pass a Buick automobile which you later saw containing the body of the boy, did you pass that automobile on the Highway on the way to the hospital?

A. It is possible, but we don't recollect that.

Q. Did you get the name of the woman who was in the Buick automobile?

A. I am afraid it was only the name of the driver.

Q. Do you have the address of the driver?

A. Yes.

Q. What is his address?

A. 609 Revolucion Avenue.

Q. Do you know his occupation?

A. No, I don't know his occupation. [21]

Q. Did this man ever live in Mexicali?

A. No.

Q. Do you know him personally?

A. That is the first day I ever saw him.

Q. Have you seen him since that day?

A. The only person I have seen is the woman once or twice.

(Deposition of Celestinno Lupercio Perez.)

Q. Do you know what they did with the bodies of the father and son after they were brought to the hospital? A. No, I don't.

Q. Have you ever been in the morgue?

By Mr. Templeton: In what?

Q. Have you ever been in the morgue?

By the Interpreter: Please repeat that, I didn't get that.

Q. Have you ever been in the morgue?

A. No.

Q. Do you know whether or not any method is used to preserve bodies after they are brought to the morgue?

By Mr. Templeton: Just a moment, I am going to object to that as calling for a conclusion of the witness on a matter on which he is not qualified as an expert. He may answer now that my objection is in.

By Mr. Maddox: Read him the question again, please.

(Reporter then read the last question.)

A. No. [22]

Q. You said you saw Luna at the scene of the accident? A. Yes.

Q. Do you know a fellow by the name of Bello? Do you know Bello, the fellow who works with Luna? A. That works with whom?

Q. With Luna? A. No, I don't.

By Mr. Maddox: All right, no other questions.

(Deposition of Celestinno Lupercio Perez.)

Redirect Examination

Q. (By Mr. Templeton): I have two or three questions. Mr. Lupercio, I will call your attention to this report. It shows the name here of Senora Elena Montoya. Where did you obtain that name?

A. That is all I could understand from this injured woman at the scene of the accident, so that is the name I took.

Q. In other words, it sounded like Montoya to you?

A. Yes, because I couldn't understand her. She was very badly injured in the month.

Q. And I notice you have the name of the minor as Eberto Montoya.

A. We asked her and she gave us that name.

Q. What was the nationality of the woman?

A. We don't know but she spoke good Spanish.

Q. Do you know what the nationality of the man and [23] boy was? A. No.

Q. Do you know whether or not they were Caucasians or Orientals?

A. No, we didn't investigate anything like that.

Q. Well, do you know whether or not there was more than one accident on the Tijuana-Mexicali Highway at or about 160 kilometers from Tijuana on the night of April 18th, 1953? A. No.

Q. You heard of no other accident on that date?

A. No.

By Mr. Templeton: That's all.

(Deposition of Celestinno Lupercio Perez.)

Recross Examination

Q. (By Mr. Maddox): I wish to ask him this: Please describe as best you can Senor Ceuvas.

A. He appears to be an elderly person, medium height or regular height.

Q. Would you say he is the height of Mr. Templeton? A. A little less.

Q. Approximately what is his weight?

A. About 160 pounds and 75 kilos, about 75 kilos or 160 pounds.

Q. What color was his hair?

A. I didn't notice that, it was night time. [24]

Q. Did you notice the color of his eyes?

A. No.

Q. Did he wear glasses? A. No.

Q. You said he is an elderly person. About what age would you say?

A. About forty years I would presume.

Q. How was he dressed on that night?

A. Just like a common laborer.

Q. Do you have the license number of his automobile?

A. They are on the copy. B-8826.

By Mr. Maddox: All right, that's all. [25]

State of California,
County of Imperial—ss.

I, M. Gayle Amack, a notary public within and for the County of Imperial, State of California, do hereby certify:

That prior to being examined the witness, Celes-

(Deposition of Celestinno Lupercio Perez.)

tinno Lupercio Perez, was sworn by me to testify to the truth, the whole truth and nothing but the truth;

That the said deposition was taken down by me in shorthand at the time and place herein stated and was thereafter reduced to typewriting under my direction;

I further certify that it was stipulated by and between counsel for the respective parties hereto that the signature to said deposition be waived, and that it shall possess the same force and effect as though read and signed by the said witness.

Witness My Hand and official seal this 4th day of March, 1954. My notarial commission expires March 8, 1957.

[Seal] /s/ M. GAYLE AMACK

Notary Public in and for the County of Imperial,
State of California.

[Endorsed]: Filed March 5, 1954.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Los Angeles, Calif., Monday, Aug. 16, 1954

Honorable Ben Harrison, Judge presiding.

Appearances: For Plaintiff, Messrs. Adams, Duque & Hazeltine (no appearance). For Defendant Sarah E. Padre, etc.: Messrs. Templeton & Miller, by Harry E. Templeton, Esq. For Defendant S. D. Hahn, etc.: Edward Carter Maddox, Esq.; Isaac Pacht, Esq. [1*]

The Court: You may proceed.

The Clerk: No. 15,951 Civil, The Prudential Insurance Company of America, plaintiff, vs. Sarah E. Padre and others.

Mr. Pacht: The defendants are ready.

Mr. Templeton: We are ready, your Honor.

The Court: I understood from the last hearing that you wanted to introduce a deposition.

Mr. Templeton: Yes, your Honor, the deposition of Ernestina Thompson. Shall I read the deposition?

The Court: I have read it.

The Clerk: Is that the one filed on May 22nd?

Mr. Templeton: I don't know the date of filing. It was taken on May 8th. Yes, that would be the one filed on the 22nd.

The Clerk: That is Padre Exhibit G in evidence.

* Page numbers appearing at top of page of original Reporter's Transcript of Testimony.

(The document referred to, marked Defendants' (Padre) Exhibit G, was received in evidence.)

Mr. Templeton: The deposition is deemed in evidence.

The Court: You may file it.

Mr. Templeton: The original has been filed and I offer that in evidence.

The Court: It may be deemed read. I have read the deposition. [3]

I understand counsel has some other witnesses they wish to present.

Mr. Pacht: Yes, we have one, your Honor.

The Court: You may proceed.

Mr. Pacht: Mr. Ritchy.

BERT RITCHY

called as a witness by the defendants, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Bert Ritchy.

Direct Examination

Q. (By Mr. Pacht): What is your business or occupation, Mr. Ritchy?

A. Police officer, City of San Diego.

Q. How long have you been such?

A. 18 years and about two months.

Q. What department of the police department are you now attached to?

A. The homicide detail.

Q. How long have you been in that department?

(Testimony of Bert Ritchy.)

A. 14 years.

Q. And in the course of your duties as a police officer and particularly in the department that you have designated, have you had occasion to make investigations of homicides and accidents? [4]

A. Yes, sir.

Q. Calling your attention to an occasion of Friday, May 7, 1954, did you have a conversation with a lady named Ernestina Thompson?

A. Yes, I did.

Q. Where did that conversation take place?

A. At Mrs. Thompson's home in San Ysidro, California.

Q. About what time of the day or night?

A. A few minutes after 7:00 p.m. on Friday, the 7th of May.

Q. Who other than yourself and Mrs. Thompson were present when you had the conversation?

A. I met Mrs. Thompson and her husband, who were out in the yard weeding in the flower bed. Mr. Thompson stood a few feet from us for a few moments and then left to continue his work in the bed and he walked away a distance of probably 25 or 30 feet and about five or six minutes after I had been talking to Mrs. Thompson another gentleman came in to the yard. He spoke to Mrs. Thompson and went directly back to where Mr. Thompson was working and had a conversation with him.

I believe that was the gentleman seated at counsel table there.

Q. Mr. Templeton?

A. Yes. [5]

(Testimony of Bert Ritchy.)

Q. I will ask you if at that time and place Mrs. Thompson did not state to you that when she arrived at the scene of the accident in which the man and boy and woman were involved near Mexicali, she did not say to you that two police cars were already there? A. Yes, she did.

Q. I will ask you if at that same time and place when you had your conversation with her Mrs. Thompson did not tell you that when she arrived at the scene of the accident she saw three persons in the car, the man, the child and a woman and that the woman was seated in the driver's seat of the car? A. Yes, she did.

Q. During the same conversation to which I have invited your attention I will ask you if Mrs. Thompson did not tell you that when she left the scene of the accident she left the man, the injured man and woman there? A. Yes, she did.

Mr. Templeton: Will you read the question and answer, Mr. Reporter.

(Question and answer read as follows:

“Q. During the same conversation to which I have just invited your attention I will ask you if Mrs. Thompson did not tell you that when she left the scene of the accident she left the man, the injured man and woman there? [6]

“A. Yes, she did.”)

Q. (By Mr. Pacht): I will ask you if at that same time and place she did not tell you that when she left the scene of the accident, leaving the in-

(Testimony of Bert Ritchy.)

jured man and woman there, that the witness Cruevas departed with her? A. Yes, she did.

Q. Did she, during the course of that conversation, tell you what time she arrived, she and the witness Cruevas arrived at the scene of the accident?

A. She stated she did not know the exact time but that they left Tijuana around 10:00 o'clock on their way to Mexicali and she stated that they had been driving about two hours when they came upon the accident.

Q. Did Mrs. Thompson during the course of this conversation tell you that she and Mr. Cruevas took the child in their automobile and placed the child in the rear seat of the car?

A. Yes, she did.

Q. What if anything did she tell you as to what her observation was as to whether the child was dead or alive or if the child died on the way to the hospital—what she knew about that fact?

A. She stated that when the child was placed in the rear seat she was sure that the child was alive.

She stated that the child was placed across the back [7] of the rear seat and that on the trip to Mexicali she kept one hand over the back seat and up against over the back of the front seat and up against—against the child's body to keep the child from rolling as they were driving. And she stated that just before they got into Mexicali she thought that the child had died.

(Testimony of Bert Ritchy.)

Q. Did you ask her how she came to that conclusion?

A. Yes. I asked her how she knew that the child was dead and she stated that he just seemed to lie still and he seemed, on the way down he seemed like he had some life in him but shortly before they reached Mexicali he seemed like he was just lying perfectly still.

I asked her whether or not she felt his pulse and she said no. I asked her whether or not she felt his heart and she said no.

Then I asked her whether or not she might have looked at his eyes and she said no.

And I asked her again: "Are you positive that the child was dead" and she said: "Well, I am pretty sure."

Q. Did you ask her whether she had made any observation upon her arrival at the scene of the accident as to whether or not the man in the car was dead or alive?

A. Yes, I did. I asked her how did she know—I asked the question: "How do you know that he was dead" and she said: "Oh, he lie very still." [8]

I asked her if she felt his pulse and she said no. I also asked her, of course, if she had felt his heart or whether she had noticed the pupils of his eyes and she said no.

I asked her if she touched him at all and she said that she did not touch him.

Q. Did you ask her how soon after her arrival

(Testimony of Bert Ritchy.)

at the scene of the accident she looked at or observed the injured man in the car?

A. I don't think I asked directly that question but I asked her how long she was at the scene of the accident and she said for just a little while.

I asked her what was the first thing that she did when they arrived at the scene and she said that they got out of the car and that the two police officers were there and they were trying to flag traffic and I said "Flag traffic." I asked her was the traffic heavy on the highway and she said no.

They were trying to get some cars to stop and help them. And then I asked her then: "What did you do" and she said: "Then we went right over and looked at the car and saw the people in the car and went around to the driver's side and the lady was hollering 'Please help me, please help me.'"

And we looked at the man in the front seat and I am sure he was dead. He wasn't moving. And the boy was in the back seat and he was still alive. [9]

And she stated that the boy was placed in the back seat of the car she was riding in and they left immediately for Mexicali.

Q. Did you ask her or did she tell you how long the police officers had been at the scene of the accident when she arrived?

A. No, I did not ask her that question.

Mr. Pacht: You may cross examine.

Cross Examination

Q. (By Mr. Templeton): Mr. Ritchy, by whom

(Testimony of Bert Ritchy.)

were you employed to make this investigation?

A. I was employed I thought at the time, by Mr. A. H. Montgomery.

Q. Well, did you subsequently find out you were employed by somebody else? A. Yes, sir.

Q. By whom?

A. By Mr. Edward Maddox.

Q. You were not making this investigation as a police officer of the San Diego Police Department?

A. No, sir.

Q. Mr. Ritchy, do you speak Spanish?

A. No, sir.

Q. Did you talk to this lady in Spanish? [10]

A. No, sir.

Q. Is it not a fact that it is very difficult for her to understand some of the English language?

A. No, sir.

Q. Isn't it a fact, Mr. Ritchy, that she carries on a conversation in English with difficulty?

A. My opinion would be no.

Mr. Templeton: No further cross examination.

The Court: That is all.

Mr. Patcht: If the court please, during the cross examination of the witness Cruevas——

Mr. Templeton: Counsel, are you arguing the case now?

Mr. Patcht: No. Mr. Maddox attempted to impeach the witness's testimony by asking him whether he had been convicted of an offense not amounting to a felony.

Your Honor at that time held that under the

usual rule that a witness can only be impeached by proof that he had been convicted of a felony.

I ask leave, if the court please, to re-open that question for a moment if I may by tendering to the court as an exhibit the record of the conviction of that witness in the courts of Mexico of a crime not amounting to a felony but to moral turpitude.

This may be a case, your Honor, where a record of a conviction of that kind of an offense may be relevant to the [11] question as to the weight to be given to the witness's testimony.

I have that record here and I would like to offer it in evidence.

The Court: You may offer it.

Mr. Templeton: If the court please, I would like to be heard on that.

I am going to object to it on the basis that at the time Mr. Maddox was asked if he had any such testimony here to offer with regard to convictions of felonies, and the witness testified and said that he did not. The witness testified not only that he had not been convicted of a felony but had not been convicted of any other crime as I recall it.

I do not believe that this record would come within the admissible evidence rule because it would have to be a conviction of a felony to be admissible.

The Court: I am going to admit it.

Mr. Templeton: May I see it, counsel?

Mr. Pacht: Excuse.

The Court: Any other witnesses?

Mr. Pacht: None, your Honor.

The Court: May I ask is there any question that

the doctor was not taken directly from the accident to the morgue?

Mr. Templeton: Is there what?

The Court: Is there any testimony here that the doctor [12] was not taken directly to the morgue, the body of the doctor?

Mr. Pacht: I don't think there is.

The Court: His body was taken directly to the morgue?

Mr. Maddox: I think it was.

Mr. Pacht: That is my recollection of the testimony.

Mr. Maddox: Yes, but not immediately.

The Court: I am willing to listen to any argument that counsel has.

Mr. Templeton: I further object to the introduction of this testimony on this document on the basis that this refers to a man by the name of Jose Losa Cruevas and not Galbino Losa Cruevas, the witness we had in court.

The Court: I will admit it for what it is worth.

Mr. Templeton: There is nothing to tie it in that this is one and the same person.

The Court: May I see it?

The Clerk: This is marked S. D. Hahn Exhibit 1.

(The document referred to, marked Defendants' Exhibit (Hahn) 1, was received in evidence.)

The Court: You may proceed.

Mr. Templeton: Before the argument, your Honor, I would like to take the stand on one point and testify that this woman does find it difficult to

speaking coherently in the English language. I am speaking of Mrs. Thompson.

The Court: Well, I think the record already discloses [13] that an interpreter was used in the taking of her deposition.

Mr. Templeton: Very well, your Honor.

The Court: What was this alleged conviction?

Mr. Pacht: It was the crime of exposing his sexual organs in public.

The Court: I will listen to any argument you have.

I want to say this, however, Mr. Pacht. While you just have come into the case, when this case was finally submitted to me before I felt that without some corroboration of Cruevas's testimony that I didn't have sufficient to find that the child had lived longer than the doctor.

I felt at that time it was a very close question. I made the comment, I think, that if we had corroboration it would be somewhat different and I am still of that opinion as far as the facts are concerned.

They had this terrible accident, this unfortunate accident and even though they had trouble removing the doctor's body I am satisfied that the doctor died before the child.

I am making that statement because heretofore I did not feel there had been that weight of testimony that would sway it one way or the other. I am speaking of the absence of corroborating testimony, but after reading this woman's deposition I

feel satisfied that Cruevas's testimony has been corroborated.

Maybe it isn't fair for me to make that statement before [14] you make your argument but I think sometimes it is a good thing for a judge to do. I remember when I practiced law I liked to know what was in the court's mind.

Mr. Pacht: It is very helpful, your Honor.

A moment ago I asked the question did they take the body of the doctor directly to the morgue and you said that they did. But in the case of the child when they started out they took the child to the hospital.

Now, if the child had been dead, as some of the witnesses testified and was lying in the back seat of the car there would have been no occasion to take him to the hospital. The mere fact that they started to the hospital with him indicates he was alive at that time.

Mr. Pacht: That may very well be the fact and yet it would not necessarily indicate that the father was dead. He was undoubtedly very badly injured and they had difficulty in getting him out of the place where he was wedged in, in the front of the car, but the fact is that the child died on the way to the hospital, according to the testimony.

The Court: Well, the question before me is whether he died on the way to the hospital or was he dead in the rear seat of the car. And I think the fact that he died on the way to the hospital is corroborated by this police officer's testimony of his conversation with this woman who said that they

took the child to the hospital and he died on the way. [15]

Mr. Pacht: That is only her conclusion without any of the usual indicia as to whether the child was dead or alive. She didn't feel his pulse. She didn't look at his eyes. She didn't feel his chest which is contrary to our testimony, by the way.

The Court: With all respect to this police officer's testimony, when he goes out as a special investigator for a party where there has been as much feeling as there has been in this case, I can't place too much weight upon it.

Neither this witness Cruevas nor this woman so far as I know, have any interest in this case whatsoever. At least there is no indication that they have any interest. They are about, you might say, they are about the only disinterested witnesses that we have had.

Mr. Pacht: Well, the same might be said with reference to the two Federal police officers who arrived at the scene of the accident and gave it as their testimony that the man was alive.

The Court: And the child was dead.

Mr. Pacht: That is right.

The Court: And yet they sent the child to the hospital. Why would they send the child to the hospital if he was dead? Why would the police officers send him to the hospital?

Mr. Pacht: Well, that is a question, a very important question, but on the other hand the testimony of Mrs. Thompson [16] is contradicted by herself in many places and contradicts the testi-

mony of the federal police officers as to when they got there—the police officers were there at the time she arrived or not. I have the places which show direct contradictions between her testimony and the police officers' testimony and her own testimony.

There are any number of places where she contradicts herself.

The Court: When before I took the case under submission there was such an even balance in the testimony I felt it couldn't be determined who died first because of a lack of corroboration on the part of the taxi driver or the man who drove Mrs. Thompson's car. I believe one of the witnesses testified he was a taxi driver.

Mr. Pacht: That is correct.

The Court: I felt that her testimony might overcome that balance.

Mr. Pacht: Well, your Honor has heard the evidence and has formed certain impressions from it and it is not for counsel to endeavor to impose his own ideas on the court.

As I read the testimony of Mrs. Thompson I gained the impression that she was quite uncertain and contradictory in many items and therefore I rather discount her testimony because there is no reason why these two federal police officers should testify as they did. [17]

The Court: Well, when a police officer in his spare time acts as a private detective he was out of his own jurisdiction and bailiwick and was performing services, probably, on his own time, which

he had a right to do, I presume, but he was there fore a purpose and I don't give his testimony the weight that I would give if he were before me in his official capacity. He was an interested party when he went down there to investigate this matter.

Mr. Pacht: Well, of course, we must also bear in mind that he has been a police officer for 18 years and he made no effort to color his testimony. For instance, he told your Honor that this woman told him that the child was alive when she took him to the hospital but that he died on the way to the hospital.

The Court: I realize that he corroborates Mrs. Thompson in that respect.

Mr. Pacht: He made no effort to color his testimony.

In addition to that you have the testimony of these two federal police officers who without equivocation——

The Court: I know, but they said the child was dead.

Mr. Pacht: That is true.

The Court: But at the same time they took the child out of the automobile and handed it to these people to take to the hospital. Now, those two things don't tie in together so far as I am concerned. [18]

Mr. Pacht: Well, I can see why that would raise a very serious question in your Honor's mind.

On the other hand, the only witnesses who say that the child was placed there for the purpose of being taken to the hospital are Mrs. Thompson and Mr. Cruevas. The police officers do not say that

they sent the child to the hospital. The police officers do not say that. They unequivocally say that their examination of the child showed that the child was dead and it seems to me that that statement in the record and taking into account the many inconsistencies in Mrs. Thompson's testimony, apart from this impeachment by Mr. Ritchy, that the conclusion which your Honor came to at the close of the case before it was re-opened that this was probably a simultaneous death and probably a correct one——

The Court: I don't know whether it was correct or not but I didn't feel that they had established it otherwise by a preponderance of the evidence.

In other words, I wasn't willing to hold that it wasn't a simultaneous death on the testimony of one person.

Mr. Pacht: That is all the argument that I have to make on that, your Honor.

The Court: This is a matter wherein I tried to get the people themselves to settle their differences.

Mr. Pacht: And both counsel have done that.

The Court: It is too bad that in a tragedy like this, [19] which has affected the lives of so many people, should be threshed out in a court. It is too bad they haven't been able to make adjustments between themselves. I am sure if they had followed your advice they would have made some settlement.

Mr. Pacht: I haven't been in touch with the parties with that thought in mind.

The Court: I think counsel have tried to encourage some settlement. I don't know what happened to it.

I think there has been some bitter feeling in this case by reason of some previous relationship. I believe that was because of the fact that the doctor and the mother of this child were never legally married and there apparently has been some feeling because of that. It is too bad to let that stand in the way of an amicable settlement.

Mr. Pacht: Well, I haven't explored the matter of settlement. I will be very glad to do so and see if the parties can come to some sort of amicable adjustment.

Mr. Maddox calls my attention to the fact and I now remember it was in the record, that the hospital and morgue are in the same building. And whether the police officers intended for the child to be taken to the hospital or to the building in which the hospital was located, which is also the morgue, is an open question.

Of course the Cruevas man and the Thompson witness say that they were taking the child to the hospital but we don't [20] know what directions were given to them by the two federal police officers.

But at any rate I would be glad to try my hand at effecting some adjustment of this matter between the parties and I am sure Mr. Templeton would join me in that effort.

Mr. Templeton: In regard to that, your Honor, I have made every effort to settle this thing, not once but two or three or four different times and we weren't able to get any place. I think the time for settlement has gone by. I don't believe it could be settled.

Mr. Maddox: May I make a brief statement on that? I don't know how important this is but I don't want you to think that my clients are just recalcitrant in this matter of settlement.

The Court: I am not saying that anybody is stubborn in the matter. It may be, however, that both sides have been stubborn.

Mr. Maddox: That is very well said. We offered to settle this on the basis of simultaneous death because it appeared that way and while Mr. Templeton and his client were completely opposed to this idea,——

The Court: Maybe your idea of settlement is to win the case. In a settlement each side makes concessions.

Mr. Maddox: That is what we were offering to do, make an equal distribution, but at that time he had this autopsy [21] report and he presented this autopsy report to me then and said, "Well, look at this. You don't expect me to settle for simultaneous death with this report."

I told him I didn't think it was valid and of course when the court ruled that this autopsy report was not admissible then Mr. Templeton said, "Well, I will be happy to settle—to compromise on simultaneous death."

Well, at that time we felt that—we were willing to make a compromise but not on that basis. And since he has produced these other witnesses we have not discussed compromise and settlement.

The Court: I always favor a settlement that is not harsh on either side, but if I have to decide

the case that is my function and I shall find that the father's death preceded that of the child.

Mr. Maddox: I want to make one statement on that if I may. I think there is one matter that Judge Pacht did not go into and that is—I would like to call the court's attention to the deposition of Mr. Peres. Mr. Peres was a police officer who was called by Mr. Templeton and he testified that he arrived at the scene of the accident and that he found the two federal officers there, the two we produced here in court.

His testimony is completely inconsistent with the testimony of the taxi driver and the woman who stated they were [22] first on the scene.

I think the great discrepancies, and I am in no position and I cannot ask the court to decide why there are discrepancies, but there are many discrepancies in this case.

The Court: Did you ever see an accident where there weren't discrepancies?

Mr. Maddox: No, your Honor, that is always true. There are always discrepancies but you must consider whether or not these discrepancies are as to material facts.

The Court: I think I leaned perhaps stronger without the corroboration, toward your side of the case. I could have found very easily that the taxi driver's testimony was true but I wouldn't accept it without corroboration.

Mr. Maddox: Well, he is disputed by Mr. Templeton's own witness. He is disputed as to who was there first.

Now, certainly if this driver was on the scene he should know whether or not there were police officers there before he got there or whether they came after he got there. They were very insistent that they were there first—the driver and also the woman who was his passenger.

Now, the testimony that is inconsistent with the testimony of the police officer, not the first two I brought here but the one who was produced by Mr. Templeton himself, and then the question is who was there first. You don't just take one aspect of the story. [23]

The Court: There are three points in this case as far as I am concerned. One is that the child was taken to the hospital; the man was taken to the morgue. That is almost sufficient in itself. I probably was leaning too strongly against Mr. Templeton's client when I didn't give too much weight or give the weight it was probably entitled to of the taxicab driver's testimony, but when they brought in this other witness I don't see how I can get away from it, counsel.

Mr. Maddox: Well, your Honor, I guess I answered improperly when I said that the father was taken to the morgue because I don't really know. I don't think that the record discloses anywhere that he was taken directly to the morgue. The hospital and morgue are in the same building.

The Court: There is no evidence he was ever taken to the hospital.

Mr. Maddox: No, but they were both taken to the same building, the same place. When you said

“directly” I didn’t know whether you meant did they stop somewhere on the way or was he kept out there, but they were both taken to the same building, to the same structure and there is a good explanation for it. After all perhaps the police officers would not like to be the ones to make a final determination of death when there is any doubt at all, so maybe the boy was taken to the hospital, but the father being pinned underneath the dashboard of the car could not be removed for some time. [24] Maybe, and it is likely he was taken to the morgue because of so much time having expired. There are many possibilities that can intervene in considering that one question.

But, your Honor, I submit again that the inconsistencies between—material inconsistencies between two witnesses called by the same side certainly is a basis for doubt as to the validity of the testimony. There are no inconsistencies between our witnesses. They gave simple statements and they told the court what happened as they saw it and I see no basis at all to doubt their testimony. There has been no impeachment of any of that testimony whereas these other witnesses hastily gotten together perhaps—I don’t know, but they are certainly contradicted on matters that they should know about if they were there and were able to account for what happened while there. It seems to me, to take just the fact, just one phase of the testimony and not consider anything else, overlooking a good possible basis of impeachment—

The Court: Well, counsel, we have a circuit court for that purpose.

Mr. Templeton, you will prepare findings this time. I think I was in error in ordering counsel to prepare findings the last time. I believe it was your job.

Mr. Templeton: I think it was.

The Court: Very well.

(Whereupon at 2:45 o'clock p.m. the above entitled matter was concluded.) [25]

[Endorsed]: Filed December 23, 1954.

[Endorsed]: No. 14609. United States Court of Appeals for the Ninth Circuit. S. D. Hahn, as Administrator of the Estate of Young D. Hahn, deceased, Appellant, vs. Sarah E. Padre, as administratrix of the Estate of Herbert Huxley Hahn, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: December 27, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14609

S. D. HAHN, etc.,

Appellant,

vs.

SARAH E. PADRE, etc.,

Respondent.

POINTS UPON WHICH APPELLANT
WILL RELY

S. D. Hahn, as Administrator of the Estate of Young D. Hahn, Deceased, herewith designates the following points as those on which he will rely in the above matter:

1. That the District Court abused its discretion in granting Respondent a continuance on February 8, 1954, when this cause was set for trial, and was partially tried.

2. That the District Court abused its discretion in reopening this cause for taking of additional, cumulative evidence on April 5, 1954, after cause had been submitted and decision announced.

3. That the Findings in this cause are not supported by the evidence.

Dated: January 14, 1955.

EDWARD CARTER MADDOX,
/s/ EDWARD CARTER MADDOX,
Attorney for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 17, 1955. Paul P. O'Brien, Clerk.

No. 14609

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

S. D. HAHN, as Administrator of the Estate of YOUNG
D. HAHN, Deceased,

Appellant,

vs.

SARAH E. PADRE, as Administratrix of the Estate of
HERBERT HUXLEY HAHN,

Appellee.

APPELLANT'S OPENING BRIEF.

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TOPICAL INDEX

	PAGE
Statement of pleadings and facts disclosing basis of jurisdiction	1
The pleadings	1
The facts	3
Abstract of statement of case presenting the questions involved and the manner in which they are raised.....	8
Specification of errors relied upon.....	10
Argument of the case.....	11
Summary	11
Argument as to abuse of discretion in granting continuances and re-opening of case.....	12
Argument as to findings not supported by evidence.....	20

TABLE OF AUTHORITIES CITED

CASES	PAGE
Equitable Life v. Irelan, 123 F. 2d 462.....	21
Fleming v. Palmer, 123 F. 2d 749; cert. den., 316 U. S. 662.....	20
Grant Co. Deposit Bank v. Greene, 200 F. 2d 835.....	18
Marshall's U. S. Auto Supply v. Clampett, 111 F. 2d 140.....	16, 18
Rue v. Fuetz, 103 Fed. Supp. 499.....	13, 14
The Plow City, 122 F. 2d 816.....	15
United States v. U. S. Gypsum Co., 333 U. S. 364.....	20

RULES

Federal Rules of Civil Procedure, Rule 52(a).....	20
Federal Rules of Civil Procedure, Rule 59(a).....	15

STATUTE

Probate Code, Sec. 296.3.....	2, 10, 25
-------------------------------	-----------

TEXTBOOKS

6 Moore's Federal Practice (2d Ed.), p. 3723.....	16
6 Moore's Federal Practice (2d Ed.), p. 3785.....	17

No. 14609
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**Statement of Pleadings and Facts Disclosing Basis of
Jurisdiction.**

The Pleadings.

Prudential Insurance Company of America, by appropriate pleadings, obtained a judgment in Interpleader in the United States District Court, Southern District of California, Central Division, on November 27, 1953, by which Appellant, as administrator of the Estate of Young D. Hahn, deceased, and Appellee as administratrix of the Estate of Herbert Huxley Hahn, deceased, were ordered to assert their respective claims to the proceeds of four insurance policies insuring the life of Herbert

Huxley Hahn in which Young D. Hahn was named beneficiary. Herbert Huxley Hahn was the son of Young D. Hahn.

Each filed a cross-complaint and an answer to the cross-complaint of the other [Appellant's Cross-Comp., R. pp. 3-9; Ans., R. pp. 17-19; Appellee's Cross-Comp., R. pp. 11-17; Ans., R. pp. 9-11]. Crucial to each cross-complaint was the claim, respectively of each interpleader, that his intestate was the survivor of a common disaster in which both decedents died.¹ [Appellant's Claim, R. p. 8; Appellee's Claim, R. p. 16].

The cause was heard at three sessions of the District Court by the Honorable Ben Harrison, on February 8, 1954; March 15, 1954, and August 16, 1954 and the Court filed its Findings of Fact and Conclusions of Law [R. p. 29-32) and Judgment [R. pp. 33-35], filed and entered on August 30, 1954, holding as to the critical issue of survivorship that Herbert Huxley Hahn was the survivor in the common disaster.

Notice of Appeal was timely filed on September 29, 1954 [R. pp. 35-36] and duly certified by the Clerk of the District Court [R. p. 37] and the designation of points upon which Appellant will rely was duly filed on January 17, 1955 [R. p. 182].

¹The Probate Court of California provides: Section 296.3 INSURED AND BENEFICIARY: Where the insured and beneficiary in a policy of life insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary.

The Facts.

The underlying facts that gave rise to the litigation are not in dispute. Young D. Hahn and his 12 year old son, Herbert Huxley Hahn, were riding in a Nash automobile driven by one Ella Moya Dioz on Highway No. 2 in the Republic of Mexico [R. p. 85] on the night of Saturday, April 18, 1953. Some time between 11:30 P.M. and midnight the car struck a cement mixer, parked on the highway, between Tia Juana and Mexicali. The driver was apparently thrown clear of the car and on to the pavement. Young D. Hahn was riding in the front seat of the car; Herbert Huxley Hahn, the son, was riding in the rear seat. Each remained in the car after the accident. Apparently, there were no eye witnesses to the accident.

The testimony as to the time of death, the critical issue here, was conflicting. Appellant called two witnesses, who were at the scene of the accident, Marcario Luna-Ramirez and Jose Bello [R. pp. 47-61 and 61-67, respectively], both of whom were police officers and both of whom appeared and testified on February 8, 1954. Appellee produced one witness in court, Galdino Losa Cruevas [R. pp. 76-97] who was at the accident itself and he testified on March 15, 1954. Appellee introduced the testimony of two other witness through depositions, who claim to have been at the scene of the accident: Celestino Lupercio Perez [R. pp. 139-161], and Ernestina Thomas whose deposition is Exhibit G in evidence [R. p. 161]. Her deposition does not appear in the printed record but was read and considered by the Court [R. p. 160]. The Perez deposition was read into the record on March 15, 1954, the same date on which Cruevas testified. The Thomas deposition was filed on May 22, 1954 [R. p. 160], and

was considered by the Court on August 16, 1954. Appellee also introduced the deposition of the autopsy surgeon, Dr. Gustavo Arevalo [R. pp. 99-137] and that deposition was considered by the Court on March 15, 1954. Appellant called one impeaching witness on August 15, 1954, Bert Ritchey [R. pp. 161-168].

The trial chronology, important in a consideration of the testimony adduced, follows:

1. *February 8, 1954.* Cause called for trial with both sides announcing ready [R. p. 38]. Appellant's witnesses, Ramirez and Luna, appeared and testified. Cause continued over Appellant's objection [R. p. 67] to March 1, 1954.

2. *March 15, 1954.* Cause again called for trial [R. p. 67], after continuance from March 1, 1954 on motion of Appellee. Appellee's witness, Cruevas, appeared and testified. Depositions of Appellee's witnesses, Arevalo and Perez, read into record. Court announces Finding of Fact of simultaneous death [R. p. 99].

3. *April 5, 1954.* Motion of Appellee to re-open cause granted.

4. *August 16, 1954.* Cause again called for trial. Deposition of Appellee's witness, Ernestina Thomas, received [R. p. 160]. Appellant's witness, Ritchey, testifies [R. pp. 161-168]. Court announces finding that Herbert Huxley Hahn survived [R. p. 171].

Ramirez and Bello were public officials, employes of the Federal Department of Highways of the Republic of Mexico [R. p. 47]. Ramirez testified on February 8, 1954, that he and Bello arrived at the scene of the acci-

dent shortly after receiving an accident call at 11:30 or 11:35 P. M., on April 18, 1953 [R. p. 48]. He testified that on arrival he found a woman lying on the ground and “inside of the car on the front, on the right side, there was a man pressed against the front seat and the instrument panel of the car. He was breathing with difficulty” [R. p. 49]. The following questions were then asked:

“Q. Was anyone in the rear seat? A. Yes, on the rear seat there was a boy, a minor. . . .

Q. Did you make any effort to determine whether or not the boy was alive? A. Yes, I did.

Q. And what effort did you make? A. That the child was dead—that he had received a—he had been stricken with something that had produced a hemorrhage [R. p. 49].”

The witness added that he felt the boy’s pulse, “but he was not breathing. He had no pulse at all. He was dead” [R. p. 50]. At that time the man on the front seat was “breathing with difficulty” and that the injured man still had a pulse at the time [R. p. 50].

Bello’s testimony corroborated that of Ramirez in the critical detail that the boy was dead at the time of arrival and that the man on the front seat (Appellant’s intestate) was alive at the time [R. p. 62].

Cruevas testified on March 15, 1954, on behalf of Appellee, that he was a taxi driver [R. p. 76]; that on April 18, 1953, he was employed to drive a lady from Tia Juana to Mexicali [R. p. 77]; that he arrived at Rumarosa at about 11 P. M. and arrived at the scene of the accident about 45 minutes later [R. p. 78]. He testified that upon arrival the man (Appellant’s intestate)

was dead [R. p. 79]; that the boy (Appellee's intestate) was still alive and that "the police" gave him the boy and told him to take the injured lad to the hospital [R. p. 82]. He added that the boy was placed in the back seat of his car and that he and his passenger took the boy to the Mexicali hospital but that the lad was dead on arrival there [R. p. 84]. He also testified that one "local officer" arrived on the scene while he was there and that "federal officers" also came [R. p. 81]. The local police, he said, preceded him to Mexicali [R. p. 83].

Perez, by deposition introduced on March 15, 1954 and taken on February 27, 1954, testified that he was a Mexicali police officer [R. p. 139] on April 18, 1953; that he received an accident call about 1 A. M. on April 19, 1953, and went to the scene of the accident [R. p. 140]. When he got there the Luna-Ramirez federal highway car was already present [R. p. 142]. The boy (Appellee's intestate) *was not there and he did not see the lad until he got to Mexicali* [R. p. 142]. The man (Appellant's intestate) was still in the Nash automobile [R. p. 142]. He did not know when the boy died [R. p. 149]. He was at the scene of the accident ten minutes, more or less [R. p. 154]. He did not see either Thomas or Cruevas at the scene.

Dr. Arevalo, by deposition introduced on March 15, 1954, and taken on February 27, 1954, testified that he was a physician who performed autopsies on the bodies of Young D. Hahn and Herbert Huxley Hahn. He first fixed the date as on or about April 19, 1953 [R. p. 101]. He first testified that he wrote his report on the 20th or 21st of April, 1953 [R. p. 107]. Later he changed his testimony to say that he performed the autopsy on April 21, 1953, and made the report on April 22, 1953

[R. p. 109]. He gave it as his opinion that Young D. Hahn "passed away at April 19th at 20 hours and that the boy, Herbert Hahn, passed away on April 19th at 23 hours" [R. p. 121]. Parenthetically, those times would be April 19 at 8 P. M. as the time of death for Young D. Hahn and April 19 at 11 P. M. for Herbert Huxley Hahn.

Ernestina Thomas, by deposition filed May 22, 1954, and received on August 15, 1954, testified that she was riding with the witness Cruevas on the night of April 18, 1953. (Paging in reference to her testimony refers to the paging in Padre Ex. G since the deposition is not in the Record.) She fixed the time of arrival at the accident at various times: at 1 A. M. [Padre Ex. G, p. 4, line 24]; at 11:45 P. M. [Padre Ex. G, p. 17, lines 20-22]; 11 P. M. [Padre Ex. G, p. 19, line 25]; and again at 11:45 P. M. [Padre Ex. G, p. 38, line 21]. She first testified that she arrived at Rumurosa at 11:45 P. M. [Padre Ex. G, p. 4, line 24.] She testified positively that there was no person at the scene of the accident on her arrival except "the people involved in the accident, and there was nobody else except the watchman" [Padre Ex. G, p. 8, lines 15-16]. Police cars came to the accident later, she said [Padre Ex. G, p. 8, lines 17-22]. The police car did not come, she testified, until about 45 minutes later [Padre Ex. G, p. 9, lines 19-22]. She testified that the boy was alive when he was handed to the taxi driver Cruevas by police officers, [Padre Ex. G, p. 11, lines 13-18] and that upon her arrival at the Mexicali hospital at about 2 P. M. he had been dead some ten minutes [Padre Ex. G, p. 15, lines 4-7]. The fair inference from her testimony is that the man (Appellant's intestate) was dead when she arrived [Padre Ex. G, p. 6, lines 12-21].

The witness Ritchey, called by Appellant on August 16, 1954, testified that he was a police officer of San Diego on April 18, 1953, and that he interviewed the witness Ernestina Thomas on May 7, 1954 [R. pp. 161-162]. He said she told him that upon her arrival at the accident two police cars were already present [R. p. 163], that she did not take the pulse of the man in the front seat (Appellant's intestate) or touch him, or notice the pupils of his eyes [R. p. 165].

Abstract of Statement of Case Presenting the Questions Involved and the Manner in Which They Are Raised.

Appellant's contentions on this appeal involve two issues. The first of them is that under the peculiar circumstances of this case the District Court abused its discretion in granting continuances and in re-opening the case for taking of additional evidence, a course that resulted in dragging the case out for a period of six months from the time when counsel for both sides announced that they were ready for trial. The trial which began on February 8, 1954, was not concluded until August 16, 1954. The issues were not obscure. At the pre-trial conference, held on January 11, 1954, the cause was set for February 8. At that time Appellee's counsel announced that he would seek to introduce an autopsy report to fix the time, and thus the order, of deaths. Appellant at once put Appellee on notice that he would object to the report in any attempt to use it for that purpose. Points and authorities were presented by both sides to the Court on the issue as to its admissibility. Appellee's counsel, by his own admission, [R. p. 40] knew on February 5, 1954, that the Court had taken an adverse view of the admis-

sibility of the report. Yet on February 8, 1954, he announced ready. Appellant announced ready and produced the witnesses Ramirez and Bello. The Court on its own motion, over the repeated protests of Appellant, continued the cause to March 1, 1954, even after Appellee's counsel admitted that he had been to the scene of the accident within three weeks of the accident and without any showing whatsoever of any diligence in preparation of the case or to secure witnesses.

The cause did not go to further trial on March 1, 1954, because in the interim, Appellee secured another continuance to March 15, 1954, in order to take the depositions of Dr. Arevalo (the very physician who had signed the autopsy report) and Perez. The matter was apparently concluded on March 15 and the Court announced a finding of simultaneous death. But Appellee was not done. On April 5, 1954, counsel for Appellee made a motion to re-open to take additional evidence. Appellant objected again. The motion was granted and the deposition of Ernestina Thomas was taken. Finally the trial dragged to its close on August 16, 1954.

There were, then, three stages of the case.

1. The stage which it had reached on February 8, 1954, when there was no competent evidence before the Court except that of Ramirez and Bello as to the priority of death. At that time the Court, had it rendered a decision, would have been forced to find that Appellant's intestate was the survivor.

2. The stage which it had reached on March 15, 1954, when a conflict had arisen by reason of testimony adduced on the Cruevas testimony and the Arevalo and Perez depositions and at which the Court announced a finding of simultaneous death.

3. The stage which it finally reached on August 16, 1954, after the Thomas deposition in which the Court found that Appellee's intestate was the survivor.

We will show that the Court overreached its discretion and by thus extending time to Appellee in effect forced the result. Appellant was denied an orderly trial; as he met each issue the Appellee was given time to circumvent the result and this without any showing of diligence in preparation that would have excused the dilatory tactics.

The second of Appellant's contentions is that the Findings are contrary to the evidence. We will show that there was no "sufficient evidence," within the meaning of Section 296.3 of the Probate Code of California, produced by Appellee to support the proposition that Young D. Hahn and Herbert Huxley Hahn "died otherwise than simultaneously."

Specification of Errors Relied Upon.

I.

The District Court erred in granting the continuance of February 8, 1954; in granting the continuance of February 25, 1954; and in granting the motion to re-open on April 8, 1954.

II.

The District Court erred in making the Finding that Herbert Huxley Hahn survived Young D. Hahn and such Finding is not supported by the evidence.

ARGUMENT OF THE CASE.

Summary.

The guarantee of a fair trial comprehends an orderly trial in which the parties stand on equal footing. Witnesses in this case had to be secured in the Republic of Mexico thus putting a heavy burden on both sides. Where there is sharp conflict in evidence, otherwise small factors may weight the cause against one party or another. At the time the cause was called for trial, Appellant had his witnesses present. They testified. They were to be contradicted in some important details by Appellee's witnesses: particularly on the vital issue of their time of arrival at the scene of the accident. Had Appellee presented his depositions and his witness at the time of the hearing Appellant's witnesses would have been available for rebuttal, or to explain apparent contradictions. But by the time Appellee had adduced his evidence these witnesses were not, and could not be, present. On the other hand, Appellee had every advantage of building up a case step by step to meet every issue presented by Appellant and to meet the Court's observations as to its deficiencies. Appellee made absolutely no showing of diligence in trying to procure and present witnesses at the time the cause was originally set, on February 8, 1954. He had no excuse for not having been ready. There is no showing and no pretence at showing that any of the witnesses he finally presented were interviewed, or even sought, prior to the trial date. Appellee built up this step-by-step case to meet the exigencies of every moment, through the advantage extended to him by the Court.

The evidence bearing directly on the priority of death is that of Ramirez and Bello on one hand and that of

Cruevas and Thomas on the other. Dr. Arevalo's testimony is worthless, since he fixed the times of the deaths as almost twenty-four hours after their occurrences. Cruevas and Thomas each contradicted the other in the very important detail as to whether the police officers were present on arrival. Perez added nothing except that he was present at the scene. In that state of the testimony there was no sufficient evidence as to the priorities of the deaths.

Argument As to Abuse of Discretion in Granting Continuances and Re-opening of Case.

The granting of continuances and the order re-opening the case to take additional evidence are part of the same pattern. Each was a step in dragging out the case to the advantage of Appellee.

Appellant is fully aware that the granting or denial of a continuance rests within the sound discretion of the District Court. Of course, the discretion to be exercised is a judicial discretion. It is noteworthy here that the continuance of February 8 was not requested by Appellee but was injected by the District Court, on the supposition that his ruling as to the admissibility of the autopsy report might have misled Appellee. But Appellee had made no such claim. The very possession of the report pointed witnesses out to him. He announced ready when the cause was called for trial, and made no request for continuance until after the Court's insistence that it should be granted. The autopsy report was signed by Dr. Gustavo Arevalo but *absolutely no effort had been made by Appellee to take the physician's testimony*. The very witnesses, Cruevas and Perez, were indicated as such in reports available to and in possession of Appellee. Appellee's

counsel had been in Mexicali shortly after the accident to make an investigation. No effort had been made to take the deposition of either Cruevas or Perez or to have them present at the trial on February 8. The short of it is that Appellee had made no efforts, and he asserts no diligence at making any efforts, to have Cruevas or Perez present at the trial on February 8. Had the depositions of Cruevas been taken or had they been interviewed the witness Thomas would have been discovered. As was well said in an analogous case involving a request to reopen.

“Public policy should not permit ‘A party litigant to gamble on reliance on one theory at the trial and after a contrary view of the evidence is adopted by the court and is to be followed in its judgment on the facts of record, to seek to reopen the case to meet other issues . . .’”

Rue v. Fuetz, 103 Fed. Supp. 499, 502.

Having failed to support his announcement of readiness on February 8, and having been given a continuance until March 1, the Appellee appeared on February 25 to seek a new continuance to take depositions. That motion was opposed by the Appellant. The Court granted it. In his supporting affidavit Appellee’s counsel made no showing of diligence in seeking the depositions. He simply recited that after the continuance he “went to Mexicali and endeavored to make arrangements for the taking of the deposition of Dr. Arevalo and two other witnesses who had been personally present at the scene of the accident.” He did not say when he went to Mexico. He recited that he met “many objections of the Mexican officials” to the taking of the depositions. He did not recite the difficulties. He simply wanted more time to produce witnesses whom he now almost miraculously, certainly fortuitously, found

were available but who had been equally available to him when the cause was first called for trial on February 8. The very fact that he found such witnesses between February 8 and February 25 is eloquent of the lack of diligence he had displayed in failing to have them present at the original trial on February 8. The continuance was granted, until March 15.

The production of the witnesses, Perez and Arevalo by depositions, and Cruevas in person availed Appellee little. The Court found simultaneous death. Findings of Fact and Conclusions of Law were prepared by Appellant's counsel and Appellee objected to them.

Finally, Appellee filed Notice of Motion for Order Re-Opening Case for Additional Evidence or for a New Trial. The Motion was heard on April 5 and granted on April 7. The motion was based on an affidavit by Appellee's counsel. He recited that he had first learned of the existence of Ernestina Thomas, the witness who said she arrived at the scene of the accident in an automobile driven by the taxi driver Cruevas, on February 17—a date which was prior to the continued trial date of March 1 and the actual trial date of March 15. He further set forth that Cruevas had given him the woman's name on March 14; that he found her on March 20, and talked to her on March 21. Her affidavit was attached. The diligence thus attempted to be shown is more apparent than real because it is a diligence exerted *after* the date the cause was set for trial, rather than in preparation for trial. It is, moreover, a diligence exerted in the same context as that adverted to in *Rue v. Fuetz*, 103 Fed. Supp. 499 in which a litigant gambles on the outcome of a trial and then, when an adverse result appears indicated by the record, seeks to reopen.

The net result of the series of continuances and orders reopening was to delay the determination of the issue for six months and while there is a discretion in the District Court there is a point at which the exercise of such discretion constitutes an abuse. In an analogous situation it was said:

“Where trial commenced on March 3, 1939, and witnesses were available for speedy hearing, action of the trial court, without request of counsel, for four adjournments so that the case was not concluded until December 17, 1939, although the trial should have taken ten days was an abuse of discretion. Public policy demands that in the interests of justice a trial once entered upon should be proceeded with from day to day.”

The Plow City, 122 F. 2d 816 (3 Cir.).

Here was a trial that should have taken a day at most, in which counsel announced ready but which was dragged on for six months.

The motion to reopen or for a new trial is also a matter that rests in the sound discretion of the District Court. As the cogent portion of Rule 59(a) provides:

“On a motion for new trial in an action tried without a jury, the Court may reopen the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions and direct the entry of a new judgment.”

The situation here was that no judgment had been entered but the Court had announced a finding on March 15 of simultaneous death. Under this situation the motion to take additional evidence should have been subjected to the same scrutiny as a motion for new trial and

the same rigorous standards applied to the question of whether or not it should be granted.

“In a court case where the judge has not rendered a decision but has indicated by an opinion or otherwise how he intends to decide, a motion to take additional testimony *to supply a defect in formal proof need not be treated as a motion for a new trial; but if additional testimony goes beyond that then the motion to take additional testimony closely approaches that of a motion for new trial on the ground of newly discovered evidence.*” (Emphasis added.)

6 Moore's Federal Practice, 2d Ed. 3723.

The evidence sought to be produced when the motion to reopen was made was not to supply a defect in formal proof but went far beyond that; it was germane to Appellee's whole theory of the case. It was his evidence in chief. Hence the motion did approach a motion for new trial on the grounds of newly discovered evidence.

A motion for a new trial on the grounds of newly discovered evidence must meet five tests:

(1) There must be a showing that the evidence was discovered since trial.

(2) There must be a showing of facts from which reasonable diligence in trying to procure the evidence prior to trial.

(3) The evidence sought to be introduced must not be cumulative.

(4) The evidence must be material.

(5) There must be a showing that a different result will probably be reached.

Marshall's U. S. Auto Supply v. Clampett, 111 F. 2d 140 (10 Cir.).

Here there was no showing whatever that the first three of the conditions had been met. True enough, the evidence, came to light after a partial hearing of the case, but that is not the entire test. The movant can not sit idly by and when threatened with adversity excuse inaction by an after acquired diligence.

“To warrant a new trial the evidence must not have been known to the movant at the time of trial; and moreover the movant must have been excusably ignorant of the facts, *i. e.*, the evidence must be such that it was not discoverable by diligent search.”

Moore's Federal Practice, 2d Ed. 3785.

The very fact that the witness Thomas was found by Appellee between February 8 and March 20 is proof enough that no diligence had been exercised in searching for her prior to that time. Every indicia of her existence and of her address was as easily available to Appellee after January 11, the date of the pre-trial hearing, as it was after Appellee had failed in the production of witnesses on March 15 to persuade the Court to his point of view. In the month between January 11 and February 8, Appellee did nothing to find the witness but in a roughly comparable period of time after February 8 he did locate the witness. The difference between his actions in the two situations is due to the fact that he switched his theory of the case after February 8 and applied the diligence to find witnesses that would have produced the same result had he done so before trial. And, of course, the *evidence was cumulative*. The Thomas deposition was simply used to cumulate the effect of the Cruevas testimony.

If the test of newly discovered evidence as it bears on a motion for new trial had been applied here, as it should have been, the motion should have been denied. A new trial will not be granted for newly discovered evidence which with reasonable diligence could have been discovered at trial.

Grant Co. Deposit Bank v. Greene, 200 F. 2d 835
(6 Cir.).

Nor does the fact that a different result *did* flow from the taking of the additional evidence argue that the motion should have been granted. By that pragmatic test any different result is made to appear as justification for the granting of a motion no matter how dilatory a litigant may be. Thus in *Marshall's U. S. Auto Supply v. Clampett, supra*, after a trial by jury there was a verdict for defendant. A new trial was granted on the ground of newly discovered evidence. Then there was a verdict for plaintiff. The Court of Appeals for the Tenth Circuit kept its attention centered on the *motion*, rather than on the *result* of the trials, and reversed on the sole ground that the motion for new trial should not have been granted; the result was to reinstate the verdict of the first hearing and to order entry of judgment for the defendant. So, here, what is at stake is whether or not the *motion* to take additional evidence should have been granted and not what flowed *after* that motion had been granted and additional testimony had been taken.

A fair trial is more than the formalities that surround a hearing. Every step, no matter how adverse to one party or another, can be clothed with the appearance of fairness. That is what happened here. On February 8, the Appellant met the burden imposed on him; the Appel-

lee failed utterly to assume his burden. A continuance was granted. There was a continuance until March 1; the Appellee was still not ready to shoulder his burden. A continuance was granted until March 15; the Appellee tried again and still could not meet the burden of proving that Herbert Huxley Hahn survived his father. A motion was made to reopen and granted and finally Appellee achieved his end, *and that through testimony that was available to him at the time the cause was set for trial on February 8*. It would be a rare litigant indeed who could not have his way if he was thus supplied with opportunities to piece-meal his evidence almost indefinitely to meet every successive rebuff. On the other hand, Appellant was disadvantaged by every turn of this wheel of fortune. His witnesses were produced and testified on February 8; thereafter, because of the peculiar facts of the case, they were not available for rebuttal or to meet new testimony, *developed to meet the very testimony they had offered*. The very purpose of the ordinary requirement that a trial must proceed from day to day until concluded is to put the parties on that equal footing which is an integral part of due process. The necessity in this case was greater than in the ordinary litigation because the witnesses could not be summoned by subpoena. They lived in Mexico. They could be secured only at the expense of great time and trouble. The witnesses Ramirez and Bello testified they got to the scene at 11:30 or 11:40; Thomas directly contradicted that by asserting that she arrived first with the taxi driver. The police officers made no mention of Thomas' presence at the scene or of handing the child to her and no such inquiries were directed to them on their initial appearance. These, and other inconsistencies between the testimony offered by the officers and the witnesses Cruevas, Perez, and Thomas,

could not be met or explained by Appellant due to the attenuated character of the trial. There is too, the undoubted fact, that time blurs testimony, even for trial judges, and that testimony adduced six months after witnesses for one side have been heard is susceptible of exerting greater weight than it might have had the matter been considered in orderly fashion. If the cause is set at large for an orderly trial the objections urged here will doubtless not recur.

Argument As to Findings Not Supported By Evidence.

The cogent portion of Rule 52(a) provides:

“Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

Obviously, this portion of the argument must be constructed within the limits of the Rule. The Supreme Court has laid down the rule for guidance of appellate courts in these words:

“A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.”

U. S. v. U. S. Gypsum Co., 333 U. S. 364, 394.

The rule has been thus stated:

“Under Rule 52(a) a finding is clearly erroneous if it is against the clear weight of the evidence and it *does not suffice that it is supported by evidence.*” (Emphasis added.)

Fleming v. Palmer, 123 F. 2d 749 (1 Cir.); Cert. Den., 316 U. S. 662.

When considering the weight of the evidence the consideration to be given the trial court's opportunity to judge of the credibility of the witness varies with the type of evidence adduced at the trial. If the witnesses appeared in person then it is plain that the trial court has an advantage of the reviewing Court. That advantage disappears if the witnesses appeared by deposition, or if the evidence is documentary.

"However findings of fact based on documentary evidence, on uncontradicted evidence, or testimony taken by depositions and in similar situations where credibility is not seriously involved, or if it is, where the reviewing court is in just as good a position as the trial court to judge credibility, are not binding on appellate courts and will be given slight weight on appeal."

Equitable Life v. Irelan, 123 F. 2d 462 (9 Cir.).

The documentary evidence in this case bearing directly on the priority of death is that contained in the autopsy report which, buttressed by the testimony given by Dr. Arevalo through his deposition, fixes the times of the deaths as of the night of April 19, although everybody agrees that the deaths occurred some time during the night of April 18. This document gave priority to the death of Young D. Hahn but no credibility can be attached either to the document or to the witness in view of the utterly ridiculous statement as to the times of death. The trial court must have paid as little heed to it as this Court can attach.

Three of the four witnesses ultimately produced by the Appellee, who claimed some intimate knowledge of the facts, testified through depositions. They were Dr. Are-

valo, Lupercio Perez and Ernestina Thomas. Only one, Cruevas, appeared in person. Therefore, the trial court was in no better position to make a judgment as to credibility than this Court except in the one instance. However *after* the Court had heard Appellant's witnesses and the witness Cruevas it made a finding of simultaneous death, indicating that little weight was given to this testimony as weighed against the testimony of Ramirez and Bello, the police officer witnesses for Appellant.

We have previously pointed out that the Arevalo testimony was hopelessly at odds with what all parties know to be the facts. The Perez deposition appears in the Record at pages 139 to 159. He testified that he did not get to the scene until at least 1 A. M. on April 19 and that when he got there he found the Ramirez-Bello police car there.

"All, we did was get there and we pick up the lady and drove away." [R. p. 142.]

The Buick car in which the witnesses Cruevas and Thomas were riding was not there, according to the witness. He did not see the boy until he got to Mexicali. He was positive that:

"The only car present was the Nash, where the passengers, collided with the equipment at the scene of the accident. And Mr. Luna's (Note: Ramirez, the names Ramirez or Luna are used interchangeably by witnesses following the Spanish custom.) car was also there and ours." [R. p. 141.]

The purport of this testimony is to buttress that of Ramirez and Bello that they arrived on the scene before any other officers.

Ernestina Thomas found herself at odds with Perez. We have previously adverted to the confused state of her

testimony as to the time of arrival. Looking at the record, which is all the trial court could do since she appeared by deposition, it is impossible to arrive at any conclusions as to the time when she did come on the scene. She directly disputed Perez by saying that the second police car (that of Perez and his partner) arrived *before* she left the scene of the accident. Cruevas also testified to the same purported fact but, as we have pointed out, Perez testified positively that he did not see the woman or the Buick or the taxi driver until *after* he went to Mexicali. The witness Thomas testified that the boy (Herbert Huxley Hahn) was put into her arms by police officers, and if that was done, it must have been done by Bello or Ramirez since Perez did not arrive, according to him, until she had gone. They gave no such testimony, although the fact would have been important. Further doubt is cast on the Thomas testimony by the fact that the witness Ritchey said that she told him police officers were present when she arrived. She also testified as to her knowledge of the presence of the boy in the car:

“Q. Now, after you arrived at the scene of the accident how long had you been there before you knew that there was a baby or boy in the back seat of the car? A. About 45 minutes, until the police arrived.” [Padre Ex. G, p. 38, lines 22-25.]

However she added immediately that Cruevas had told her there was a boy in the back seat, and a moment later that Cruevas showed her the boy, 15 minutes after their arrival at the scene [Padre Ex. G, p. 39, lines 1-24]. She also testified that although she sat in the front seat of the Buick automobile she put her hand on the boy and felt his heart beat, although the witness Ritchey said she told him the opposite. Although Perez testified positively,

as pointed out, that the Buick was not at the scene of the accident when he arrived, and that he did not see the boy until he arrived in Mexicali, Cruevas said that:

“Q. And were you given any instructions by the traffic officers as to what to do with the boy? A. They told me to follow them until we arrive at the hospital.

Q. Which officers told you that? A. The traffic officers.

Q. And did the local police car (Note: the Perez car) then leave the scene and head toward Mexicali? A. Yes, they went to the hospital right away.

Q. And did you follow them immediately? A. Yes.

Q. Did you keep up with them? A. Not quite too close because the baby was sick and also the lady was sick?

Q. By the lady are you referring to the lady who was riding with you? A. Yes.”

Here is utter confusion, casting the gravest doubt on the whole story told by Thomas and Cruevas. A trained police officer, used to investigating accidents, called to an accident to care for the injured, testified positively that neither Cruevas nor Thomas was present upon his arrival. He had no doubt on that score. He could not forget an incident so important as whether or not he led the car to Mexicali or who was present when he arrived. He was Appellee's witness. Yet other Appellee's witnesses contradict him and in the choice there is every reason to believe him to be correct.

The witnesses, Ramirez and Bello, were also trained police officers, accustomed to taking down the details of an accident and to assessing important facts. Neither of

them testified to any such fact as giving the boy to the woman Thomas or to the taxi driver. In their case, as in Perez, there is every reason to believe that such an important fact would have been impressed in their memories.

In contrast to the testimony of the witnesses for the Appellee the testimony of the police officer witnesses for Appellant were straight forward and without contradiction. It would seem that in light of the requirements of Section 296.3 that there must be lacking that "sufficient evidence that they have died other than simultaneously" and that in the state of the record the only possible finding was that either Young D. Hahn had survived or that the two died simultaneously.

Inextricably interwoven with the argument that the evidence does not sustain the critical finding is the manner in which the trial was conducted at intervals which blurred testimony and gave Appellant little, or no, chance to meet the next onset of Appellee's testimony. Under the circumstances, this Court should closely scrutinize the record, particularly the testimony of the witnesses.

The ends of justice will be best served in this cause by returning it for that orderly trial to which all parties are entitled, or by revising the finding to that of simultaneous death.

Respectfully submitted,

MILLER, MADDOX & SHEATS,

By EDWARD CARTER MADDOX,
Attorneys for Appellant.

No. 14609

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

S. D. HAHN, as Administrator of the Estate of Young D.
Hahn, Deceased,

Appellant,

vs.

SARAH E. PADRE, as Administratrix of the Estate of Her-
bert Huxley Hahn, Deceased,

Appellee.

APPELLEE'S REPLY BRIEF.

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TOPICAL INDEX

	PAGE
Preliminary statement of facts and issues.....	1
The pleadings	1
The facts	2
Issues raised by the appellant in Specification I.....	8
Contentions to be advanced by appellee on the issues.....	9
Argument of the case.....	11
The continuance granted February 8, 1954.....	11
a. Diligence of appellee prior to trial.....	12
b. The continuance on court's motion.....	16
The continuance granted February 25, 1954.....	17
The motion to re-open granted April 8, 1954.....	20
Appellant's claim of having been denied an orderly trial.....	27
The findings of fact as supported by the evidence.....	30
Conclusion	41

TABLE OF AUTHORITIES CITED

CASES	PAGE
Azvedo v. Benevolent Soc. of Calif., 125 Cal. App. 2d 894.....	37
Bjornson v. Alaska S.S. Co., 193 F. 2d 433.....	39
Blytheville Cotton Oil Co. v. Kurn, 155 F. 2d 467.....	23
Brannock v. Bromley, 30 Cal. App. 2d 516.....	13, 19
Brown v. Graham, 62 Idaho 388, 112 P. 2d 485.....	26
City of Hialeah v. Harris, 83 F. 2d 999.....	17
Colusa Remedy Co. v. United States, 176 F. 2d 554.....	40
Crater's Estate, In re, 13 N. Y. S. 2d 597.....	14
Di Bella, Estate of, 100 N. Y. S. 2d 763, 107 N. Y. S. 2d 929..	38
Dietrich v. United States Shipping Board, 9 F. 2d 733.....	15
Equitable Life Ins. Co. v. Irelan, 123 F. 2d 462.....	39
Fidelity & Deposit Co. v. Bucki & Son, 189 U. S. 135.....	15
Gas Ridge v. Suburban Agric. Products, 150 F. 2d 1020.....	24
Gile v. Duke, 5 F. 2d 952.....	24
Girard Trust v. Amsterdam, 128 F. 2d 376.....	15
Harrah v. Morgenthau, 89 F. 2d 863.....	15
Heintz v. Cooper, 104 Cal. 668.....	13
Jacuzzi Bros. Inc. v. Berkeley Pump Co., 191 F. 2d 632.....	40
Johnson v. United States, 32 F. 2d 127.....	22
Marshall's U. S. Auto Supply v. Clampett, 111 F. 2d 140.....	22, 27
Matagorda Canal Co. v. Styles, 207 S. W. 562.....	17
Oberlander v. Fixen Co., 129 Cal. 690.....	27
Occidental Life Ins. Co. v. Thomas, 107 F. 2d 876.....	40
Patterson v. National Life Co., 183 F. 2d 745.....	23, 24
Prisament v. United States, 96 F. 2d 865.....	22
Rue v. Feutz Const. Co., 103 Fed. Supp. 499.....	21
Shapiro v. Rubens, 166 F. 2d 659.....	40
Skinner Mfg. Co. v. Kellogg Sales Co., 143 F. 2d 895.....	24
State ex rel. Clark v. Bailey, 99 Mont. 484, 44 P. 2d 740.....	17

	PAGE
State v. Evans, 98 Ore. 214, 192 Pac. 1062.....	26
The Plow City, 122 F. 2d 816.....	29
United States v. Colangelo, 27 Fed. Supp. 921.....	23
United States v. U. S. Gypsum Co., 333 U. S. 364.....	40
Waller v. Groves, 20 Conn. 305.....	26

RULES

Federal Rules of Civil Procedure, Rule 52(a).....	39, 40
Federal Rules of Civil Procedure, Rule 59(a)	25

STATUTE

California Probate Code, Sec. 296.3.....	7, 8, 37
--	----------

TEXTBOOK

6 Moore's Federal Practice (2d Ed.), p. 3722.....	25
6 Moore's Federal Practice (2d Ed.), p. 3723.....	22
6 Moore's Federal Practice (2d Ed.), p. 3728.....	25

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Appellee.

APPELLEE'S REPLY BRIEF.

Preliminary Statement of Facts and Issues.

The Pleadings.

The statement of the Pleadings on pages 1 and 2 of Appellant's Opening Brief are correct in what they state. The Appellee Will supplement the statement by supplying the dates upon which the Cross-Complaints in Interpleader and Answers thereto were filed.

Appellant's Cross-Complaint was filed on December 29, 1953 [R. p. 9], and the Appellee's Answer thereto was filed January 7, 1954. [R. p. 12.] Appellee's Cross-Complaint was filed on January 7, 1954 [R. p. 17], and Appellant's Answer thereto was filed January 13, 1954. [R. p. 19.]

The Facts.

The first paragraph on page 3 of the Opening Brief adequately describes that portion of the facts which it purports to cover. However, the Appellee offers the following corrections to the balance of Appellant's Statement of Facts and will supplement and add to the facts later in this Reply Brief, particularly in showing that the Finding of Fact, that Herbert Huxley Hahn survived Young D. Hahn, is supported by the evidence.

Corrections to Appellant's Statement of Facts.

(1) The name of Appellee's witness, referred to on page 5 of the Opening Brief as "Cruevas," should be corrected to read "Cuevas."

(2) Appellant states on page 6 of his Brief that Cuevas testified: "* * * 'one local officer' arrived on the scene * * *." Relating to the same event, Cuevas testified by indicating there was more than one such officer. He referred to them as "policemen" [R. p. 81] and as "They" —"They went to the hospital right away." [R. p. 83.]

(3) On page 7, Appellant cites four instances wherein witness Thomas testified to the time of her arrival at the scene of the accident, apparently to show inconsistency on her part. Appellee will add: in the first three instances cited, the witness indicated "about" the particular time stated; and in the fourth, she stated "around" the certain hour.

Appellee also directs the Court's attention to the misspelling of witness Thomas' name in the Reporter's Transcript. She is referred to therein as "Thompson." No person named Thompson appeared in this cause as a witness or otherwise.

Since the Appellant's argument involves the diligence of the Appellee in preparing her case, the time element is important in arguing such a point. This brief log of the pertinent events in the history of the case will present a graphic account of the events:

BY THE COURT.

BY THE PARTIES.

Dec. 2, 1953

Notice of Entry of Judgment in Interpleader. Judgment for the insurance company, had been docketed and entered November 30th.

Dec. 29, 1953

Court on its own motion ordered pre-trial hearing set for January 11, 1954.

Dec. 29, 1953

Appellant filed Cross-Complaint in Interpleader. [R. p. 9.]

Jan. 7, 1954

Appellee filed Answer to Cross-Complaint in Interpleader [R. p. 11] and Appellee filed Cross-Complaint. [R. p. 17.]

Jan. 11, 1954

Pre-trial hearing held. Set Trial for February 8th.

Jan. 11, 1954

Appellee offered into evidence the Autopsy Reports and Death Certificates. [Padre Exs. B and C.]

Jan. 13, 1954

Appellant filed Answer to Appellee's Cross - Complaint. [R. p. 19.]

BY THE COURT.

Feb. 8, 1954

Trial held; continued to March 1, on Court's motion.

BY THE PARTIES.

Feb. 17, 1954

Appellee first learned name of her witness, Cuevas. [R. p. 24.]

Feb. 22, 1954

Appellee first learned of "a woman" who had ridden with Cuevas to scene of accident. She was not at her home address. [R. p. 25.]

Feb. 24, 1954

Appellee filed Notice of Motion for Order Continuing Date of Hearing.

Feb. 25, 1954

Court granted motion, continuing trial to March 15th.

Mar. 4, 1954

Deposition taken of Appellee's witness, Dr. Arevalo. [R. p. 137.]

Deposition taken of Appellee's witness, Officer Perez. [R. p. 159.]

Mar. 14, 1954

Appellee's witness, Cuevas, told Appellee's attorney

BY THE COURT.

Mar. 15, 1954

Trial was held. [R. p. 160.]

BY THE PARTIES.

that the "woman" previously referred to by Cuevas on February 22nd was named Ernestine and was living somewhere in the San Diego area. [R. p. 26.]

Mar. 17, 1954

Attorney for Appellee engaged persons in San Diego to search for "Ernestine" (Thomas), the "woman." [R. p. 26.]

Mar. 19, 1954

The "woman," Ernestine Thomas, was located in San Ysidro, California. [R. p. 26.]

Mar. 21, 1954

Affidavit of Thomas obtained to accompany Appellee's Motion to Reopen case. [R. p. 27.]

Mar. 26, 1954

Appellee filed Notice of Motion for Order Reopening Case for Additional Evidence or for a New Trial. [R. p. 29.]

BY THE COURT.

BY THE PARTIES.

Apr. 5, 1954

Motion to Reopen granted.

May 8, 1955

Deposition of Ernestine
Thomas taken. [Padre Ex.
G.]

Aug. 16, 1954

Trial; Findings—Herbert
Hahn survived Y. D.
Hahn. [R. p. 29.]

Aug. 30, 1954

Findings, Conclusion and
Judgment filed and en-
tered. [R. pp. 29, 33.]

At the time of the Pre-trial Hearing on January 11, 1954, the issues to result from Appellee's Cross-Complaint were not established because the Answer of the Appellant had not yet been filed. During the Pre-trial Hearing the Appellee submitted the certified copy of the Autopsy Report of Dr. Arevalo and the Court announced that it would rule upon its admission as evidence and notify the Appellee of its ruling. [R. pp. 21, 43, 45.] The Court did not announce its ruling that it was inadmissible until the session of the trial on February 8, 1954, although Appellee learned from the Clerk of the Court on February 5th what the probable ruling would be. [R. p. 40.] Since it was clear at the time of the trial that Appellee had not learned of the ruling in time to procure other evidence, especially of eye witnesses at the scene of the accident, the Court on its own motion granted a continuance of the trial until March 1st, on the ground of public interest and jus-

tice. [R. pp. 45, 65.] At the February 8th session the counsel for Appellee stated that he believed the date of March 1st would not allow him time to procure such evidence in view of its being difficult for him to obtain evidence in Mexico. [R. p. 66.] A week before the March 1st setting, counsel for Appellee filed a motion to continue the trial to March 15th and his affidavit accounted for his acts to procure evidence which he had found in Mexico prior to February 24th and the necessity for such extension. [R. pp. 19-23.]

At the February 8th session the Court was not clear on the California law applicable, and had the opinion that a presumption of death was involved in determining the recipient of the insurance policies which were the subject of the Interpleader action. Since the Simultaneous Death Statute, Section 296.3 of the Probate Code, had superseded the Rule of a presumption, the Court had no clear view of the matter before the Court up to that point, and what might be required in the way of evidence. [R. p. 39.]

The affidavit of counsel for Appellee shows that he first learned on February 22nd that there had been "a woman" with witness Cuevas at the scene of the accident. It was later learned that she was married to someone whose first or surname was "Thomas." Counsel began search for the woman immediately and it was not until March 19th that an investigator for Appellee located her. Counsel returned to San Diego County and obtained her Ernestine Thomas affidavit on March 21st. [R. pp. 25-29.]

Issues Raised by the Appellant in Specification I.

As stated by Appellant:

1. Under the peculiar circumstances of this case the District Court abused its discretion in granting continuances and in re-opening the case for taking of additional evidence. (Substantially as stated by Appellant, Op. Br. p. 8.)

2. The Findings are contrary to the evidence. There was not sufficient evidence produced by Appellee, within the meaning of Section 296.3 of the Probate Code of California, to support the proposition that Young D. Hahn and Herbert Huxley Hahn died otherwise than simultaneously.

The Appellant's Specification of Errors conform to the above issues.

In arguing the issues of the abuse of discretion by the trial court, Appellant also raises the following issues although they are not segregated and set out as such in the Opening Brief:

A. The diligence or the lack of the same by Appellee in procuring evidence for the trial of February 8, 1954. (App. p. 11.)

B. The propriety or lack of the same of the Court's own motion to continue the trial to March 1, 1954, at the February 8th session. (App. p. 12.)

C. The diligence or lack of the same of Appellee in procuring the evidence which was the basis of Appellee's motion to continue the March 1st trial date to March 15th. (App. pp. 12, 13.)

D. Whether or not the Appellee was diligent in procuring witness Thomas, upon whose anticipated testimony

the Court re-opened the case by order of April 5, 1954. (App. p. 14.)

E. Whether the affidavits relating to Ernestine Thomas anticipated testimony were or were not sufficient to order re-opening of the case. (App. pp. 16, 18.)

F. Whether or not the Appellee had gambled on the results of the trial of March 15th before attempting to present the deposition of witness Thomas, after that trial. (App. p. 14.)

G. Whether or not Appellant was prejudiced or his cause injured because the trial was conducted at more than one session. (App. pp. 15, 19, 20.)

The Following Propositions and Contentions Will Be Advanced by the Appellee in Arguing on the Above Issues.

As to the first issue stated by the Appellant, the record shows no facts upon which to base the conclusion that the trial court abused its discretion in granting the two continuances and in re-opening the case.

As to the issues designated A through G.:

(1) The record does not show that any detailed statement of the action taken and the problems encountered by Appellee to procure evidence in the period, preceding the trial date of February 8th, was ever required or ever given by the Appellee, except in the instance of Dr. Arevalo.

(2) The trial court had the power to grant the continuance on its own motion at the trial of February 8th on the ground of public interest and justice, where Appellee did not learn the Court's ruling that the certified copies of the autopsy report would be inadmissible until immediately before the trial, through no fault of the Appellee.

(3) The affidavits of Appellee's counsel supporting the motions to continue the case to March 15th and to reopen the case contained sufficient facts to justify the granting of the respective motions and they were timely.

(4) The affidavit of Appellee's counsel recited the steps and delays encountered to obtain the testimony of witnesses in making the motion for continuance until March 15th. The affidavit of the counsel also stated in detail the steps taken in locating witness Thomas, showing that it was newly discovered evidence since the trial and the affidavit of Thomas showed that the witness could establish the time of death of Herbert Huxley Hahn, which had not been ascertained at the trial and her affidavit also corroborated the testimony of witness, Cuevas, for Appellee, who had testified on matters at the scene of the accident. The effect of both affidavits being sufficient to qualify her expected testimony as additional evidence at a re-opened case and also for a new trial if the same were to be granted.

(5) The record does not show that the two continuances or the re-opening of the case prevented Appellant from recalling any of his witnesses or other witnesses for rebuttal or any other purpose at any sessions of the trial. Nor does the record show the Appellant received an unfair trial or suffered any prejudice in the conduct of the case. The newly discovered evidence received on August 16th merely tipped the weight of the evidence in favor of the Appellee as something added later to objects already established in balance.

ARGUMENT OF THE CASE.

Appellee contends that no errors were committed by the District Court in neither Specification I nor Specification II as specified by Appellant, and each specification should be rejected.

Specification I: The Continuance Granted February 8, 1954.

At the trial of that date, the Court on its own motion continued the case to March 1st. Previous to the trial, the parties appeared at a Pre-trial Hearing on January 11th and at that time the Court inquired if counsel had any documents to be presented in evidence. Counsel for Appellee submitted certified copies of the Autopsy Reports for Y. D. Hahn and Herbert Huxley Hahn, who had died as the result of an automobile accident in Mexico. Certified copies of the Certificates of Death for the decedents were also submitted. It was understood at that time that the Court would rule on the admissibility of the documents in time to allow Appellee to procure other evidence in the event the documents were not to be admitted. [R. p. 21.] At the February 8th trial, the Autopsy Reports were ruled inadmissible. [R. p. 39.] The Court stated that the late ruling placed the Appellee at disadvantage and therefore the Court would continue the case in the interest of justice and to avoid undue advantage of Appellee's counsel. [R. p. 45.] Appellant objected orally to the continuances saying "he thought" Appellee had had ample time to obtain other evidence. [R. p. 67.] Counsel for Appellee stated he had relied upon the fact that he would receive an early ruling on the admissibility of the Reports. [R. pp. 40, 45.]

A. Diligence of the Appellee Prior to Trial.

Appellant argues: (1) That no diligence was shown on the part of Appellee in procuring evidence in time for the trial. He reasons that counsel for the Appellee had visited the scene within three weeks of the accident. (App. pp. 9, 11.) (2) That knowledge of the existence of the witnesses subsequently called by Appellee was available to her before trial. That witness, Dr. Arevalo was then known through the Autopsy Reports and the chauffeur, Cuevas, and Local Police Officer, Perez, were indicated in reports available and in the possession of the Appellee. (App. p. 12.) (3) That because Appellee found the witnesses between February 8th and 25th, that he could have found them prior to trial.

Answering his first argument: the assertion of lack of diligence is conjecture. There is nothing in the record in the nature of a detailed statement of Appellee's acts to obtain evidence prior to trial nor of the problems encountered in any investigation. Nor does it appear that Appellee was ever required to make such a showing. There are fragments of information in the record consistent, circumstantially, with the proposition that there was diligence. Counsel for Appellee stated at the trial that he had been to Mexico within "a couple of weeks" of the accident. [R. p. 45.] He also said he had encountered difficulties; that it was "very hard" for him to get any testimony out of Mexico [R. p. 40] , and similarly "Every time I try to get something in Mexico it takes so much longer than it does here * * *." [R. p. 66.]

The term "diligence" is a relative term, incapable of exact definition.

So holding:

Heintz v. Cooper, 104 Cal. 668, 38 Pac. 511;

Brannock v. Bromley, 30 Cal. App. 2d 516, 86 P. 2d 1062, 1066.

Answering the second argument: as to Dr. Arevalo; Appellee admits he was known but it was expected that his Autopsy Reports would cover any testimony the Doctor might give, prior to knowledge of a ruling on the documents. Since the Appellee ascertained the Reports would be held inadmissible on February 5th, it was a very short time in which to travel to Mexico on the hope of finding the Doctor and obtaining his deposition. [R. p. 40.] Appellant argues that the Autopsy Reports pointed out "witnesses," in the plural, to Appellant. (App. p. 12.) But, an examination of the Reports shows no mention of anyone other than the respective decedents and the signatures to the Reports. [Padre, Exs. B, C.] As to Cuevas and Perez: the only other report then known to Appellee was that of Federal Highway Officer, Luna-Ramirez, a witness for Appellant. The Luna-Ramirez report mentioned no other persons than the two persons who eventually died as a result of the accident, the two Hahns; and Mrs. Diaz. [Padre, Ex. A, pp. 1-3.]

As to Cuevas and Perez; the cross-examination of the Federal Highway Officer, Luna-Ramirez, on February 8th, indicated that one of the "rural police" in a car had notified him of the accident. [R. p. 53.] On February 17th, Appellee obtained a certified copy of a report of the Chief of Police of Mexicali, reciting that Patrol Car No. 1 had transported a Mrs. Montoya (Diaz) to the Mexicali Hospital from the scene of the accident. Likewise, a Buick car driven by Cuevas transported a minor, Eberto

Montoya (it was later learned that the identification in the report was in error. The minor was Herbert Huxley Hahn), "who had died on the way." [Padre, Ex. D, lines 10-24.] It may be reasonably inferred that the testimony of Appellant's witness, Luna-Ramirez, led to the rural police, through whom the Mexicali Police Department report was located, and which identified Cuevas and Local Officer, Perez of Patrol Car No. 1, as potential witnesses. But that was learned after the February 8th trial. The affidavit of Appellee's counsel shows that he learned on February 22nd from Cuevas that "a woman" was with Cuevas at the scene and that she, Ernestine Thomas, was not located until March 19th. [R. pp. 25-29.]

Answering his third argument: The fact that witnesses were ultimately produced does not establish the premise that a diligent search would have produced them at an earlier date. A diligent search may result in total failure. In the case of *In re Crater's Estate* (1939), 171 Misc. 732, 13 N. Y. S. 2d 597, the ultimate in diligent search was shown in the attempt to locate the missing Justice Crater of New York. The search was world wide, but it did not result in locating the jurist. If the justice were found in the future, it would be practically impossible to deem the search, reported in the case, as not diligent. At least there would be a complete record to argue from in the *Crater* case but here there is none.

In answer to Appellant's first argument, Appellee indicated that it was difficult to obtain testimony in Mexico. It may be noted that Cuevas testified that a watchman, for the parked cement mixer struck by the car of the decedents, was at the scene when he arrived and the record

is silent on an explanation why the watchman was not called as a witness by either party. [R. p. 79.] If it were an easy matter to locate witnesses Cuevas, Perez and Thomas, it would be reasonable to expect the Appellant to have called at least one of them. Appellee's counsel, as stated before, visited Mexicali shortly after the accident. Certainly an attorney who made that effort would not be likely to fritter away his time in a half hearted attempt to launch an investigation for his client.

The granting or refusal of a motion for continuance rests within the sound discretion of the trial judge, and his ruling will not be disturbed on appeal unless abuse of discretion is shown.

In accord and so holding:

Fidelity & Deposit Co. v. Bucki & Son Lumber Co.,
189 U. S. 135, 143, 23 S. Ct. 582, 47 L. Ed. 744;

Girard Trust Co. v. Amsterdam (5 Cir., 1942),
128 F. 2d 376, 377;

Dietrich v. U. S. Shipping Board (2 Cir., 1925),
9 F. 2d 733.

At page 746 of the *Dietrich* case, it was held:

“The continuance of a pending action or its postponement is inherently in all courts, and is generally a matter resting in the Court's discretion, and reviewable only for abuse.”

Also in accord with the point on discretion:

Harrah v. Morgenthau (1937), 67 App. D. C.
119, 89 F. 2d 863.

As shown above, the Court granted Appellee a continuance in the interest of justice after the Court believed it had misled counsel for the Appellee. The Court was

seeking to try the case on the merits and so stated: "We are not trying to determine these things on mere technicalities. We want to determine what the truth is if we can." [R. p. 45.] Such a ground is not an abuse of discretion.

B. The Continuance on the Court's Motion.

Appellant contends that Appellee made no claim that he was misled by the late ruling of the Court on the inadmissibility of the Autopsy Reports. But, that it was "injected" by the District Court on a supposition. (App. p. 12.)

From the context of the statements by the Court and counsel at the trial, it is clear that counsel referred to an expected early ruling on the documents when he said, "I had reliance upon that. Then it was impossible for me to get any witnesses up here from Mexico * * *." [R. p. 40.] Later counsel asked in the interest of justice to take the depositions of some witnesses down there and reported that he thought he would have sufficient time after the Court's ruling (on the Reports) to get needed evidence. [R. p. 45.]

Those statements by counsel clearly show he claimed to have been misled. His asking for leave to take depositions was substantially, but not technically perhaps, in the form of a motion to continue. The ground for the continuance rested on the Court's not wanting to take advantage of counsel. [R. p. 45.] Therefore, it was not necessary to investigate the other actions of the Appellee in preparing for trial as another ground for the continuance. The Court was interested in obtaining the true facts, so that the cause could be tried on the merits and not on technicalities. [R. pp. 45, 67.]

It is immaterial whether counsel formally made the motion or whether the Court continued the case on its own order.

The Court may order a continuance on its own motion.

Cases so holding:

City of Hialeah v. Harris (1936), 83 F. 2d 999;

State ex rel. Clark v. Bailey (1935), 99 Mont. 484, 44 P. 2d 740;

Matagorda Canal Co. v. Styles (Tex. Civ. App., 1918), 207 S. W. 562.

Specification I: The Continuance Granted February 25, 1954.

On February 25th, the trial having been set for March 1st, a hearing was held on Appellee's motion for continuance to March 15th. The supporting affidavit stated, among other things, that the depositions of Dr. Arevalo and two other eye-witnesses of the scene of the accident (Cuevas and Perez) were being sought, but that arrangements could not be made with reporters in sufficient time for the March 1st date; there being but two reporters in the area. Appellant orally opposed the motion at the hearing.

Appellant argues: that Appellee made no showing of diligence in seeking the depositions (App. p. 13); that affiant did not state when he went to Mexico (App. p. 13); that affiant did not recite the difficulties encountered in obtaining the depositions (App. p. 13); that the witnesses heard had been equally available to him prior to the February 8th trial (App. pp. 13, 14); that Appellant's witnesses could not be present on the continued date (App. p. 11).

In answer to Appellant's arguments: the motion of Appellee was timely; about a week before the trial date. If the Appellant deemed the affidavit insufficient, he had the opportunity to file counter-affidavits, which he did not do. There is nothing in the record concerning the arguments or replies given at the hearing on the motion. At the time of continuing the trial on February 8th, counsel for Appellee told the Court he did not believe that March 1st would allow him sufficient time to produce witnesses. [R. pp. 65, 66.] The Appellant is now referring back to a stale matter by seeking to reopen the hearing of February 25th in his Brief.

The argument that Appellee had shown no diligence in obtaining the continuance is without foundation as the contents of the affidavit manifest reasonable diligence. The Appellant admits in his brief that Appellee was diligent in the search for witnesses after February 8th.

“* * * after February 8 and he (Appellee) applied the diligence to find witnesses that would have produced the same result had he done so before trial.”

(App. p. 17.) The exact date was not required to be shown when counsel went to Mexico. It was before February 23rd, the date of the affidavit, and which was considerably before trial as then set. (The affidavit to re-open the case shows that Cuevas was first seen by counsel on February 17th in Mexico. [R. pp. 24, 25.]) As to “difficulties” left unexplained, the affiant used, strong general terms, “* * * affiant met with many objections on behalf of the Mexican Officials involved * * *.” [R. p. 22.] If the Appellant wanted more precise language used or the exact time of affiant's trip to Mexico, he could have sought it through counter-affidavits. Ap-

pellee has already answered the argument that the witnesses concerned were available before February 8th, in the argument of the Continuance of February 8th. Appellant makes a statement in his brief that his witnesses could not be present at the March 15th hearing. (App. p. 11.) But, there is nothing in the record to indicate that he was unable to recall them at that time or any other time. Appellant concludes his brief asking for a new trial. (App. p. 25.) It now appears that the witnesses are available.

If Appellee had knowledge of the witnesses, Cuevas and Perez, which she did not, before the first session of the trial, her counsel would have, no doubt, been required to have been more meticulous in his affidavit supporting his motion concerning his search for them. But counsel did state a reasonably full narration of his finding them.

It was held in the case of:

Brannock v. Bromley, 30 Cal. App. 2d 516, 86 P. 2d 1062, 1066.

“There is not hard and fast rule to the effect that each step taken by the moving party in searching for witnesses must be detailed in a meticulous manner, though admittedly it is better practice to specifically enumerate such facts.”

In that case, a witness to an accident was found by plaintiff eight months after judgment had been given against him.

In Appellee's argument herein with respect to the Continuance of February 8th, points and authorities were given to the effect that continuances are within the discretion of the Court. They are therefore referred to at this time.

Specification I: The Motion to Reopen Granted April 8, 1954.

Following the trial of March 15th, the Court stated, "I will find * * * both were killed simultaneously." [R. p. 99.] No findings or conclusions were signed by the Court to that effect. It was an expression of an opinion.

In argument against the granting of the motion to reopen or for a new trial, Appellant says: (1) The evidence of Thomas' existence was as easily available to Appellee after January 11th as it was after the March 15th trial. (App. p. 17.) (2) The Appellee switched the theory of the case after February 8th and then applied diligence to find witnesses. (App. p. 17.) (3) The diligence to locate Thomas was after the trial and not before. (App. p. 14.) (4) To qualify for re-opening, the newly discovered evidence was required to meet the test of evidence upon which to base a motion for new trial. (App. p. 16.) (5) The testimony of Thomas was cumulative of that offered by Cuevas. (App. p. 17.)

In answer to the first point: Appellee has already argued the diligence of Appellee to find witnesses under the Continuance Granted February 8th. The testimony of Appellant's witness, Luna-Ramirez, pointed toward the Rural Police having been associated with the accident. That in turn led to the Mexicali local police and through them to the discovery of Cuevas. Finally Cuevas told counsel on February 22nd of "a woman" who had ridden with him in her Buick to the scene of the accident and during the ride to the hospital with the boy. But had moved from her Tijuana address and it was said that she moved "to the United States." But she was thought married to a

man named Thomas, whether first or surname. On the same day after leaving her old residence, counsel called at the police station and also at the United States Immigration authorities without success in locating her. Finally, on the way to the trial of March 15th, Cuevas reported he had learned her first name and that she was living in the San Diego area. After employing investigators in the area, a search of the shipyards resulted in locating her husband and eventually her on March 19th. [R. pp. 25-27.] No part of the chain of information was known to Appellee until the dates stated. And it wasn't "easily discovered."

As to the second argument: Appellee did not change the theory of her case as one might in shifting from one legal theory in an action to another. At the first trial session she depended on the Autopsy Reports and the Death Certificates because they were all she had been able to procure in a foreign country and a considerable distance from her counsel's office. When the slender hope of finding eye-witnesses was found on February 8th, success followed. Appellee did not gamble on the theory of relying only upon documents. The case of *Rue v. Feutz Construction Co.*, 103 Fed. Supp. 499, cited by Appellant, is not in point. The party seeking to reopen, sought to use testimony of persons whose knowledge of the facts were known to it throughout and even before the trial. At page 502 the Court held: "Indeed the parties from whom additional evidence would be elicited are persons who are and have been readily available to the garnishee."

On the third argument: Appellee has already presented argument why the search for witnesses, whomever they might eventually have been, was conducted after the session of February 8th.

In answering the fourth argument: Appellee contends that the testimony of Thomas met all of the tests which would have been required for granting a motion for a new trial on the ground of newly discovered evidence.

In reply to the argument that the tests applied to newly discovered evidence for a new trial should be applied to Thomas' evidence on the motion to re-open, Appellee maintains that it is not definitely established by the cases and furthermore, that it was within the discretion of the Court to grant the motion. One of the tests is that it be newly discovered since the trial. That is reasonable.

In support of Appellant's argument requiring the new trial tests, he cites:

6 *Moore's Federal Practice* (2d Ed.) 3723. (App. p. 16.) Appellant recites five tests for newly discovered evidence for new trial as given in the case of:

Marshall's U. S. Auto Supply v. Clampett (10 Cir.), 111 Fed. 2d 140.

That the evidence be newly discovered since the trial; there must be a showing of facts that there was reasonable diligence in trying to procure the evidence prior to trial; it must not be cumulative; it must be material; and there must be a showing that a different result will probably be reached.

The *Marshall* case cites its authority as:

Prisament v. United States (5 Cir.), 96 F. 2d 865.

In turn the *Prisament* case cites:

Johnson v. United States (8 Cir.), 32 Fed. 2d 127.

It was held in the *Johnson* case at page 130, on the tests for evidence for a new trial: "There must ordinarily be

present and concur five verities, to wit: * * *"; then follow the tests. The term "ordinarily" evidently refers to latitude given for the Court's discretion.

Moore's statement, referred to by Appellant, is to the effect, that after an opinion has been expressed by a judge, a motion to take additional testimony closely approaches that of a motion for new trial on the ground of newly discovered evidence. Just how closely it approaches is not explained in detail. The cases cited by Moore in support of the statement, speak only of "newly discovered evidence." They do not mention the other four tests. If at all, those four tests can only be included by inference. In the case of *United States v. Colangelo* (E. D., N. Y., 1939), 27 Fed. Supp. 921, only an opinion had been rendered and the Court gave plaintiff the benefit of the doubt as to having newly discovered evidence in re-opening.

In the case of *Blytheville Cotton Oil Co. v. Kurn* (6 Cir., 1946), 155 Fed. 2d 467, 470, it was held that the motion to re-open was equivalent to a new trial. But there a judgment had been entered. The motion was not based upon evidence which appeared to be newly discovered. Under those facts, it is not authority for Moore's statement which refers to re-opening after only an opinion has been given.

It was held in the case of *Patterson v. National Life etc. Co.* (6 Cir., 1950), 183 Fed. 2d 745, 747,

"In the present case, appellant's request was not made until after the District Court had given its oral ruling on a factual issue involved. It was not newly discovered evidence."

It would appear that the Courts do not require the more strict tests required for a new trial in the case of a re-opening after an opinion has been expressed. The former situation asks that the whole case or part of it be retried; certainly a major effort and the undoing of a great deal. But, merely adding to evidence already well in the mind of the Court entails a relatively small effort on the part of the Court and the litigants, and is accomplished with relative dispatch.

A motion to re-open is normally addressed to the discretion of the trial court. In accord and so holding:

Skinner Mfg. Co. v. Kellogg Sales Co. (8 Cir., 1944), 143 F. 2d 895, 900, Cert. Den. (1944) 323 U. S. 766;

Gas Ridge v. Suburban Agric. Products (5 Cir., 1945), 150 F. 2d 1020, Cert. Den. (1946) 326 U. S. 796;

Patterson v. National Life etc. Co. (6 Cir., 1950), 183 F. 2d 745, 747.

The discretionary denial or grant of the motion will not be interfered with by an appellate court unless abuse of discretion has been shown, whether the action be tried by the Court or jury.

Gile v. Duke (9 Cir., 1925), 5 F. 2d 952, 953, and *Skinner Mfg. Co.* and *Gas Ridge* cases, immediately above.

Moore concludes his on re-opening in general by stating:

“A district court, then, should consider a motion to reopen to take additional testimony in light of all the surrounding circumstances and grant or deny it in the interest of fairness and substantial justice. If the grant or denial involves an exercise of discretion

by the trial court; and because this court has a feel for the case that an appellate court can seldom have, the trial court's ruling is subject to reversal only in a rare case where abuse is clearly shown."

6 Moore's Federal Practice, 2d Ed. 3728.

Moore, at page 3722, states that the motion to re-open does not rest on Section 59a of the Federal Rules of Procedure.

As to discovery since the trial: The exact time of discovery of Thomas' knowledge of the matter was on March 20th, when council first talked to her. [R. pp. 28, 29.]

In answering the third argument on this point of re-opening, Appellee has already covered the affidavit of Appellee's counsel which supported the motion and has shown diligence therein. The Appellee's reply to the first point on the motion to re-open outlines the steps taken to locate Thomas as indicated in the affidavit of counsel. [R. pp. 25-27.] There is no doubt that the evidence was material. Thomas added the evidence which established almost the exact time when Herbert Hahn died in her car en route to the hospital and she also testified that Y. D. Hahn had died prior to the boy. As to the affidavit of Thomas being sufficient to show that a different result would probably be reached if her testimony were heard, it was reasonably stated in detail of her observations. [R. pp. 28, 29], and which was repeated in her testimony. That testimony coming when the evidence was in balance, might reasonably be assumed to tip the weight in a new direction; and it did.

As to its being cumulative and in answer to Appellant's fifth point: Thomas' testimony is reflected in the findings

as to the time of death of Herbert Hahn. [R. p. 31.] She had the only opportunity, of all the witnesses on either side, to observe the death. Therefore, her testimony is not cumulative. Not only did her evidence tip the weight of evidence in Appellee's favor, but her testimony gave greater weight to that of Cuevas than had been given to it at the March 15th session. [R. pp. 170, 173, 175, 179.]

Her testimony corroborated Cuevas on several points, it is true, but she went beyond his testimony when she established the precise time of death. She observed the boy under different circumstances than the other witnesses. They observed the boy at the scene of the accident and they carried him for a short way. Whereas she observed him during a half hour ride in her car by touching his body. She presented a new specific fact, another ground for establishing the death. [Padre, Ex. G, p. 13, line 25, to p. 15, line 3.]

It was held in the case of *Waller v. Groves*, 20 Conn. 305,

“But that evidence which brings to light some new and independent truth of a different character, although it tend to prove the same proposition or ground of claim insisted on, is not cumulative within the meaning of the rule on this subject; * * *.”

That was a case of libel and was cited with approval in *State v. Evans* (1920), 98 Ore. 214, 192 Pac. 1062, 1067. Of the same accord, *Brown v. Graham*, 62 Idaho 388, 112 P. 2d 485.

California analyzes the purpose of the test regarding cumulative evidence. It ties it to the test of probability of a different result and the question of “cumulative” is subordinate to it.

Oberlander v. Fixen Co., 129 Cal. 690, 62 Pac. 254, 257, holds at page 257:

“Hence the rule, so often reiterated by the courts, that a new trial should not be granted where the evidence is merely cumulative, must be regarded (in this state), not as an independent rule, additional to those established by the provisions of section 657 of the Code of Civil Procedure, but as ‘a mere application of those rules, or as it has been expressed, as corollary of the requirement that newly discovered evidence must be such as to render a different result probable on a re-trial of the case.’ Hayne, *New Trial*, pp. 255-6.”

Thus if the evidence is sufficient to probably change the results, its cumulative character will not permit its being the basis for a new trial. Perhaps, very often, cumulative evidence would not produce a new result.

Appellee has shown the tests of the *Marshall U. S. Supply* case are subject to variation, and since the motion to re-open was discretionary with the Court, in any event, the motion should stand since no abuse of discretion was proved.

Appellant's Claim of Having Been Denied an Orderly Trial.

Appellant contends, that together, the two continuances and the re-opening of the trial denied him an orderly trial. (App. p. 10.) He presents the following arguments: (1) It resulted in an advantage to Appellee by permitting Appellee to meet the issues (of fact?) piecemeal as they arose. (App. pp. 12, 19.) (2) The judge's recollection of testimony of Appellant's earlier witnesses may have been blurred by the passage of time and gave

witnesses, who were heard later greater weight in the judge's weighing of the evidence. (App. p. 20.) (3) Appellant was at a disadvantage in not being able to present his witnesses in rebuttal. (App. p. 11.)

In answer to the above arguments, Appellee contends:

As to the first point: In the preceding argument by Appellee, it has been shown that each continuance and the re-opening were on a sound basis and the discretion of the Court was not abused in granting them. There was only one basic issue of fact in the case: the order of deaths of the two persons. Appellee has also shown and argued that her witnesses, Cuevas and Perez were sought immediately after the February 8th session; also that the search for Thomas was begun before the March 15th session, but she was not found until later. There was no holding back of witnesses nor looking for them, depending upon developments at the trial.

Appellant requested that his witnesses, Luna-Ramirez and Bello, be heard on February 8th after knowing of the continued date. He could have held them for the March trial; they would then have been on hand to rebut testimony, if required.

As to the second argument: At the first two sessions the greatest part of the evidence was heard on both sides. (App. p. 4.) The several weeks between those sessions were not an unduly long period for the judge to remember the evidence. At the end of the second session, the evidence was evenly balanced as of that time. [R. 98, 99.] It was a completed phase in which Cuevas' testimony largely balanced the evidence of the Appellant. Cuevas testified to being told by the Appellant's witnesses to take the boy to the hospital. It was striking evidence to con-

tradict testimony that the boy had died at the scene of the accident. [R. p. 83.] The period of time at which Thomas' testimony would follow the first phase was not important because any weight to strengthen Cuevas' testimony or to add new evidence, would tip the balance. The potential weakness of Appellant's evidence was noted in the first phase. [R. pp. 170, 171, 173, 175, 179.] The total lapsed time of six months for the three trial sessions could not reasonably fade the judge's memory or upset his sense of values in appraising evidence.

Appellants cited the case of *The Plow City* (3 Cir.), 122 F. 2d 816, as comparable to this case, to support his contention of abuse of discretion. The total period of the trial extended for nine months and all of the witnesses, on both sides, were available throughout. The adjournments were not sought by counsel but by the Court; page 819, of the reported case. Contrary to that case, the instant case on appeal herein has shown that Appellee's witnesses were not available and the Court made but one continuance on its own motion. Appellant's quotation on page 15 of his Brief appears to be quoted from a headnote. His last sentence appears to be complete, but that does not agree with the report of the case. At page 819 it holds:

“Public policy demands that, in the interest of prompt and efficient administration of justice, a trial once entered upon should be proceeded with from day to day until it is concluded, unless the exigencies of the cause or the public interest imperatively require a reasonable adjournment.”

Thus the *Plow City* case holds that exigencies are to be considered. Appellee contends that those exigencies existed in the case now on appeal.

As to the third argument: the record does not show anything to indicate that Appellant's witnesses were not available for rebuttal. And as already argued, he now asks for a new trial, indicating, inferentially, that they are now available. At the re-opened session Appellant presented the testimony of Ritchy to counter that of Thomas. [R. pp. 161-167.]

Appellant has failed to show that his case was prejudiced or placed at a disadvantage by the conduct of the trial, or that there has been an abuse of discretion. The entire Specification of Error I, should therefore be rejected.

Specification II: The Findings of Fact as Supported by the Evidence.

Appellant has specified that the District Court erred in making the finding that Herbert Huxley Hahn survived Y. D. Hahn, in that it is not supported by the evidence.

Appellee contends that not only is there substantial evidence to support the Court's Findings, but it is clear and convincing.

A summary of Appellee's evidence shows:

As to witness Cuevas' testimony: He and Ernestine Thomas, riding in the same auto, arrived at the scene of the accident about 11:45 P. M., Saturday, April 18, 1953, before any police arrived. A watchman for the cement mixer involved in the accident, was there when they arrived. [R. pp. 77, 81, 86.] Cuevas observed that Y. D. Hahn was already dead, in the wrecked car, and the injured Mrs. Diaz was lying in the road. [R. pp. 79, 80.] One of the Federal Highway Officers later handed

the boy, Herbert, to Cuevas to be placed in the car Cuevas was driving. [R. p. 83.] While carrying the boy, Cuevas observed the boy was making sounds as though injured and his body was warm. [R. p. 82.] The Federal Highway Officer told Cuevas to drive the boy to the hospital. [R. p. 83.] During the half hour ride to the Mexicali Hospital, Mrs. Thomas sat in the front seat, reaching over to hold the boy in the rear seat. At the hospital, one of the Local Police Officers who had been at the accident, took the boy from the car. [R. p. 84.] Cuevas also gave information of the accident to that officer at that time. [R. pp. 87, 88.] At the scene of the accident, the car of the Federal Highway Officers arrived first, then Local Police Car No. 1. He followed the latter car when he drove from the scene. [R. p. 83.] Cuevas saw no ambulance at any time. [R. p. 94.] The Local Police Car carried Mrs. Diaz to the hospital. [R. p. 83.]

As to witness Thomas' testimony: the witness testified through an interpreter. She stated that she had hired Cuevas to drive her car from Tijuana to Mexicali on the evening of April 18th. [Padre, Ex. G, p. 3, lines 8-19.] The consensus of her statements as to the time of arrival at the scene was about 11:45 P. M. [Padre, Ex. G, p. 4, line 24; p. 17, lines 20-22; p. 19, line 25; p. 38, line 21.] At the scene of the accident she observed Y. D. Hahn was seated in the front seat of the wrecked car and that he was not breathing. [Padre, Ex. G, p. 6, lines 19-21; p. 7, lines 5-15.] She saw Mrs. Diaz lying on the pavement. Thomas said she was very nervous at the scene. [Padre, Ex. G, p. 8, lines 20-22; p. 10, lines 12-14.] She saw the officer pick up the boy and turn the child over to Cuevas, who put the boy on the rear seat of her car. [Padre Ex. G, p. 9, line 23, to p. 10, line

4.] She was told by an officer to follow a police car to the hospital and her car followed as directed. [Padre, Ex. G, pp. 13, 10-18.] At the time when the boy was handed to Cuevas, she could hear the boy breathing. [Padre, Ex. G, p. 13, lines 1-8.] While on the way to the hospital, she was seated in the front seat and turned around to hold the boy with her hand. She could feel his heart beat when she put her hand on his chest and could feel him breath. He was dead when they arrived at the hospital. [Padre, Ex. G, p. 13, line 25, to p. 15, line 3.] She observed that the boy's heart stopped about ten minutes before they arrived at the hospital. [Padre, Ex. G, p. 15, lines 14-21.]

At the hospital, she heard someone say there was no ambulance; that it was broken, and later she heard over the radio that it was broken. [Padre, Ex. G, p. 33, line 21, to p. 34, line 23.]

As to the testimony of Dr. Arevalo: the Doctor had seen the bodies of Y. D. Hahn and Herbert Hahn on April 19th. [R. pp. 101, 102.] He dated his Autopsy Reports of the two decedents on April 22nd. In his opinion, according to his report, Y. D. Hahn died at 20 hours (8 P. M.), April 19, and Herbert died at 23 hours (11 P. M.), the same day. [R. pp. 106, 117.] The death of the latter occurred a few hours before the autopsy. [R. p. 119.] (There was considerable examination and cross-examination of the Doctor as to the dates when he examined the bodies and when he made and signed his reports. There was some confusion in his testimony as to the dates.) The Doctor testified the wounds of Y. D. Hahn were more severe than the boy's. The former's hemorrhage was bigger than the boy's and Y. D. Hahn

had a big, open head wound; the boy had no open head wound. [R. pp. 122-123.]

As to the testimony of witness Perez: he was the Chief Officer of the Department of Patrol of the Mexicali Police Department, but a corporal at the time of the accident. [R. p. 139.] He was riding with Officer Beltran at the time he heard of the accident. [R. p. 140.] He had seen the Federal Highway Officers' car, the only car, at the accident. [R. p. 141.] He saw Y. D. Hahn in the wrecked car and he drove Mrs. Diaz to the hospital. [R. pp. 141-142.] He first saw the boy, then dead at the hospital. [R. p. 142.] At the hospital, he took the name and address of Cuevas that carried the boy to the hospital. [R. pp. 143-148.] He testified a woman was in the car driven by Cuevas. [R. p. 148.] He had made a report of the accident at his Police Department. [R. pp. 146-148.]

As to Padre Exhibit "D": the certified copy of the report on the accident in the files of the Mexicali Police Department was admitted into evidence. It corroborated Officer Perez, that his Patrol Car No. 1 transported the injured Mrs. Diaz and that the Buick, driven by Cuevas, transported the boy to the hospital and "who died on the way." [Padre, Ex. D, lines 10-24.]

Appellee's evidence also included the Autopsy Reports on Y. D. Hahn and Herbert Hahn [Padre, Exs. B, C], as well as certified copies of death for each. [R. p. 73.]

Appellant argues that the above evidence was not sufficient to establish the order of deaths. He relies upon the conflicts in evidence to support his position. His attack consists of an attempt to show that Cuevas and Thomas were not at the scene of the accident, because

his witnesses, Luna-Ramirez and Bello, the Federal Highway Officers, and Perez testified they did not see them at the accident. He brushes off Cuevas' testimony by saying little weight had been given to it by the Court at the March 15th session of the trial. (App. p. 22.) However, the Court stated the case was in balance on that date and he couldn't determine the order of deaths without some corroboration of Cuevas' testimony. [R. p. 173.] Cuevas must have had considerable weight in order to counterbalance that of both of Appellant's witnesses.

Appellant argues chiefly against the testimony of Thomas. He seeks to minimize her testimony by saying it was not clear whether she learned the boy was present at the scene 15 or 45 minutes after she arrived there (App. p. 23); that she was confused on the exact time of her arrival at the scene (App. p. 7); that she was confused as to the time the police cars arrived. (App. p. 7.) Appellant argues that the statements by the officers nullify any testimony by Thomas that she rode in the car with the boy to the hospital; their statements being that they did not see her at the scene of the accident. Officer Perez testified he did not see Federal Highway Officer Bello at the scene. Thus his observations as to the persons present was not perfect. [R. p. 142.]

Appellant's witness, Ritchy, a San Diego Police Officer, who talked to Mrs. Thomas, testified that she told him the police officers were at the scene before she arrived. (App. p. 23.) Appellee draws the Court's attention to her testimony absolutely denying she made the statement to Ritchy. [Padre Ex. G, p. 25, lines 7-14; p. 37, lines 7-16.] It will be noted that Ritchy testified that she said the boy was alive at the scene and that he died en route

to the hospital. Also, that Y. D. Hahn was dead at the scene. [R. pp. 164-166.] The trial court stated that Ritchy corroborated Thomas on those points and that, otherwise, he couldn't place much weight upon the testimony of Ritchy acting as a special investigator. [R. pp. 171, 172.] In Appellant's Brief, in the last four lines of page 23, he states first, that Thomas testified to putting her hand on the boy and felt his heart beat. Then he says she told Ritchy the opposite. The latter statement is incorrect as Ritchy's testimony shows. He stated she told him that she kept one hand on the boy's body to keep him from rolling. [R. p. 164.]

The details at the scene, which Appellant maintains she did not state convincingly, are minor ones in determining whether she was at the scene of the accident or not. The very important and major point is that the Mexicali Police Department record established her at the scene and in transporting the boy to the hospital. Perez' testimony supports the same facts. That is independent and impartial evidence, firmly establishing them on the scene.

Mrs. Thomas may not have been fully accurate on the minor matters. She stated she was very nervous at the time. [Padre Ex. G, p. 8, lines 20-22; p. 10, lines 12-14.] She had no watch with her that evening. [Padre Ex. G, p. 16, lines 3-4.] Also, she had been ill during that time. [Padre Ex. G, p. 19, lines 20-22; R. p. 83.]

Appellant also states in his Brief that Thomas testified that the boy had been placed in her arms by the officers at the scene. (App. p. 23.) That too is incorrect. It is not found in her testimony and the only evidence in the record is that Cuevas received the boy.

Dr. Arevalo's Autopsy Reports did show the order of deaths, but it would appear that Herbert Hahn was not

the survivor by as long as three hours. The fact that Y. D. Hahn was more seriously injured makes it more reasonable that he died first.

Appellant's witnesses are to be doubted, Luna-Ramirez referred to an ambulance which allegedly came to transport the three victims from the scene. [R. p. 50.] Bello indicated that there were more than one ambulance involved. [R. p. 63.] Appellee's witness, Perez, and of course Cuevas and Thomas showed that they carried the injured Mrs. Diaz in the Local Police car No. 1 and the boy in the Buick. The Mexicali Police record corroborates them. [Padre Ex. D.] Thomas testified that she heard at the hospital and later over the radio, that the ambulance at Mexicali was broken. Although it was hearsay, it was not objected to. Considering the size of Mexicali, it is reasonable to believe that it was the only ambulance there.

As to the death of Y. D. Hahn, Appellant's witnesses agree that he was dead before the boy was taken from the scene of the accident. Cuevas and Thomas stated he was dead when they arrived.

The half hour ride with the boy to the hospital allowed Thomas the greatest opportunity of all the witnesses to observe the condition of the boy. Her attention was concentrated upon him during that period. Undoubtedly, the observation of the boy by the officers at the scene was cursory.

The trial court was of the opinion that Cuevas and Thomas were disinterested witnesses. "Neither this witness Cuevas nor this woman so far as I know, have any interest in this case whatsoever. At least there is no indication that they have any interest. They are about,

you might say, they are about the only disinterested witnesses that we have had.” [R. p. 172.] The Judge summarized his view of the evidence at the close of the trial:

“The Court: There are three points in this case as far as I am concerned. One is that the child was taken to the hospital; the man was taken to the morgue. That is almost sufficient in itself. I probably was leaning too strongly against Mr. Templeton’s client when I didn’t give too much weight or give the weight it was probably entitled to of the taxicab driver’s testimony, but when they brought in this other witness I don’t see how you can get away from it, counsel.” [R. p. 179.]

The foregoing statement of Appellee’s evidence qualifies it as sufficient evidence to sustain the Findings of Fact.

Section 296.3 of the Probate Code of California applies to insurance policies, in simultaneous death cases. The provisions do not apply if sufficient evidence as to the order of deaths is available. The case of:

Azvedo v. Benevolent Society of California (1954),
125 Cal. App. 2d 894, 900,

holds as follows:

“The cases cited also hold with remarkable uniformity that if there is any sufficient evidence that either party survived the other, even when the deaths occur at substantially the same time, the statute (Sec. 296.3) is inapplicable and the question of survivorship must be determined as any other fact. No case has been found indicating that mere difficulty in determining which one survived justifies the court in

abandoning the task and seek shelter under the protecting arms of the simultaneous death statute.”

The above case cites with approval the case of:

Estate of DiBella (1950), 100 N. Y. S. 2d 763,
affd. 107 N. Y. S. 2d 929.

In that case it was held that an interval of one second between the deaths would render a similar section in-operative.

Under the California law, the Estate of Herbert Huxley Hahn is entitled to the proceeds of the insurance policies as he survived Y. D. Hahn, the beneficiary.

Argument as to Disturbing the Findings of Fact.

Appellant argues that since three of the four witnesses presented by Appellee (there were five) testified through depositions, the Court of Appeals is in as good a position to judge the credibility of Appellee's evidence as the trial court. He also minimizes the weight of eye-witness Cuevas, who appeared in court as a witness.

Appellee has already contended and shown that the trial court gave considerable weight to Cuevas testimony. Further, the conflict in the evidence at the March 15th session of the trial was represented on Appellant's side by the testimony in court in Luna-Ramirez and Bello. The credibility of those two witnesses was materially before the Court at all times, as was that of Cuevas. Therefore, the Court of Appeals does not have the advantage which the trial court had in judging their credibility. This is not a situation where the cause was largely determined by deposition.

Appellant cites the case of:

Equitable Life Insurance Co. v. Irelan (9 Cir.),
123 F. 2d 462.

According to the holding quoted at page 21 of his Brief, the evidence in the case of appeal is binding on the Appellate Court. There was considerable contradictory evidence and it was not all by deposition. The credibility of witnesses on both sides was involved.

Appellee has shown that the evidence supporting the Findings was substantial or sufficient, the terms being synonymous. Under these facts, the Findings should not be disturbed on appeal.

Rule 52a of the Federal Rules of Civil Procedure provides that findings shall not be set aside unless clearly erroneous.

The following cases construe that section:

It was held in:

Bjornson v. Alaska S.S. Co. (9 Cir., 1951), 193
F. 2d 433,

at page 433:

“And it does not mean (Rule 52a) that the reviewing court shall determine from the record where the weight of the evidence lies. It is not clearly erroneous for the trial court to choose between two permissible but conflicting views as to the weight of the evidence. *United States v. Yellow Cab Co.*, 338 U. S. 338, 342, 70 S. Ct. 177, 94 L. Ed. 150. A finding supported by substantial evidence may be said to be ‘clearly erroneous’ if the reviewing court, after consideration of all the pertinent evidence, has a ‘definite and firm conviction that a mistake has been committed.’ ”

Citing:

United States v. U. S. Gypsum Co., 333 U. S. 364,
394.

It was held in:

Shapiro v. Rubens (7 Cir., 1948), 166 F. 2d 659,
666,

at page 666:

“* * * but we will not disturb findings unless they cannot be sustained upon any rational view of all of the evidence including all reasonable inferences of which the testimony is susceptible * * *.”

The case of

Occidental Life Insurance Co. v. Thomas (9 Cir., 1939), 107 F. 2d 876,

holds that the Appellate Court may not weigh the evidence but must accept the findings unless no reasonable man could draw such conclusions from the evidence.

Also construing Rules 52a, the following case urges restraint by the Appellate Court in disturbing findings.

Jacuzzi Bros. Inc. v. Berkeley Pump Co. (9 Cir., 1951), 191 F. 2d 632.

In the case of:

Colusa Remedy Co. v. United States (8 Cir., 1949),
176 F. 2d 554,

it was held at page 557:

“* * * where a court has considered conflicting evidence, and made a finding or decree, it is presumptively correct, and unless obvious error of law has intervened, or some mistake of fact has been made, the finding or decree must be permitted to stand.”

Conclusion.

It is submitted on the basis of the conduct of the trial court in granting two continuances and in granting the motion to re-open the case, that the ends of justice and public policy were met in trying the case upon its merits as presented by the facts, rather than bending toward any superficial technicalities. The Appellee had a difficult task to procure evidence in a foreign country and her diligence to obtain the necessary evidence was shown. The trial court exercised its discretionary powers without abuse and without any injury or prejudice to the procedural or substantive rights of the Appellant. Since the Appellee's action was based upon adequate findings supported by sufficient evidence, it is respectfully submitted that the Specifications for Error relied upon be rejected; that a new trial be denied Appellant; that the findings be undisturbed and the judgment appealed from be affirmed.

Respectfully submitted,

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Administratrix of the Estate of Herbert
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No. 14,610

United States Court of Appeals
For the Ninth Circuit

BERNARD G. JESONIS,

Appellant,

vs.

OLIVER J. OLSON AND Co.,

Appellee.

BRIEF FOR APPELLANT.

HERBERT RESNER,

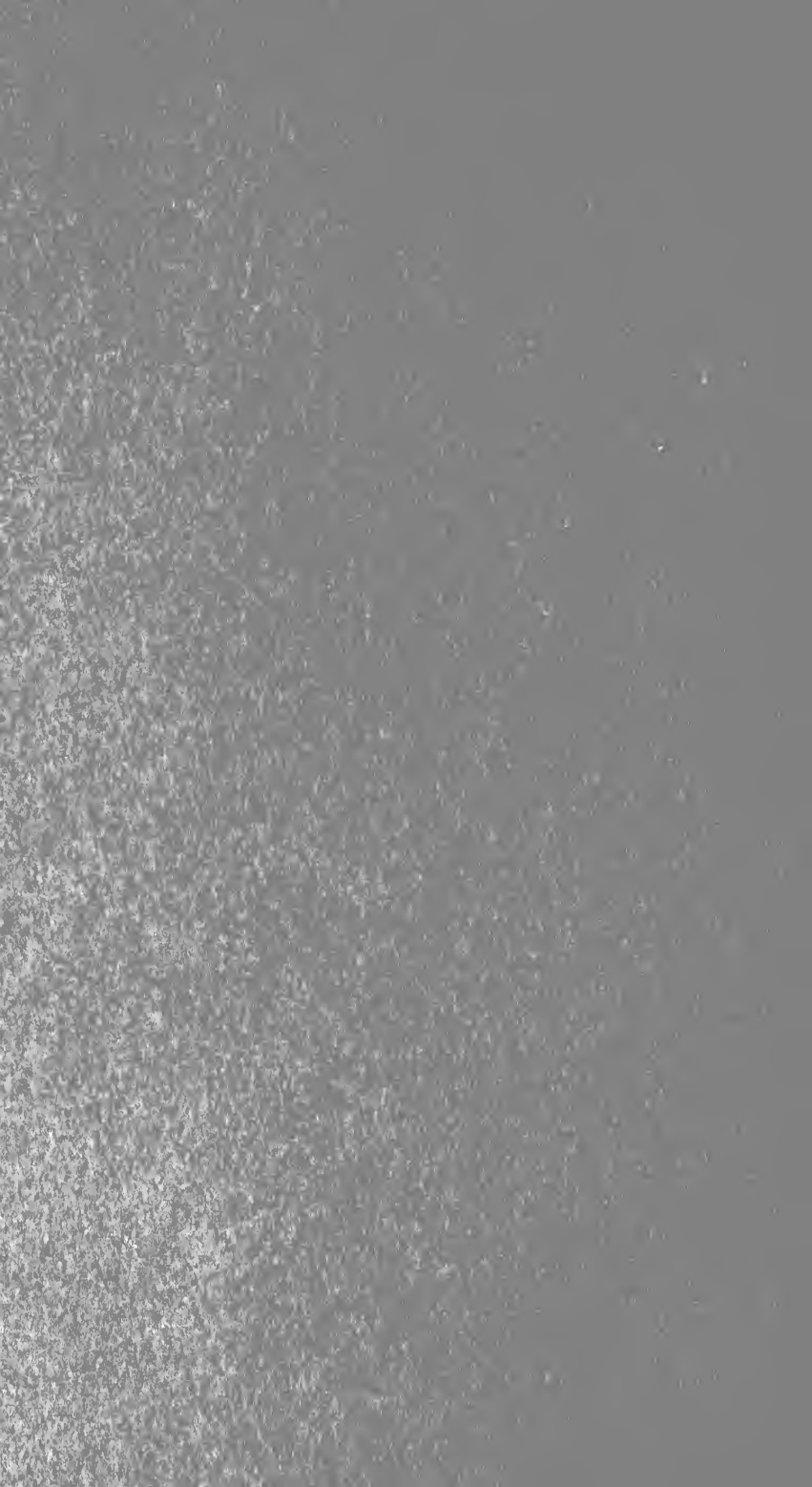
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Subject Index

	Page
I. Jurisdiction	1
II. Questions involved	2
III. Statement of the case	2
IV. Summary of argument.....	3
V. Argument	4
1. The court below erred in granting certain instructions requested by appellee and in refusing other instructions requested by appellant.....	4
A. The court's instructions on the doctrine of "assumption of risk" were erroneous, and materially affected the jury's verdict.....	4
B. The court erred in giving an "unavoidable accident" instruction requested by appellee.....	11
C. The court unduly emphasized "defense" instructions, misstated the law in various of these instructions, and gave improper "formula" instructions	13
D. The court erred in failing to give instructions requested by appellant	19
2. The court erred on jurisdiction in taking away from the jury the maritime issue of unseaworthiness.....	21
3. The jury's verdict was clearly against the weight of the evidence and amounted to a miscarriage of justice	29
4. If the trial court properly had jurisdiction, in the absence of a jury, to decide the question of unseaworthiness, then an appeal in admiralty is presented on this question, and this court has jurisdiction to decide de novo whether the trial court's verdict was proper. Appellant contends the vessel was unseaworthy and the verdict should have gone for him on the unseaworthiness count	34

Table of Authorities Cited

Cases	Pages
Armit v. Loveland (C.C.A. 3), 115 Fed. 2d 308.....	7, 34
Balado v. Lykes Bros. (C.C.A. 2), 179 Fed. 2d 943.....	29
Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 71 L. Ed. 1069	29
Bass v. Baltimore & Ohio R. Co. (C.C.A. 7), 142 Fed. 779..	22
Beadle v. Spencer, 298 U. S. 124, 56 S. Ct. 712, 80 L. Ed. 1082.....	10
Brooklyn Eastern Dist. Term. v. United States, 287 U. S. 170, 53 S. Ct. 103, 77 L. Ed. 240.....	35
Chutak v. Southern Counties Gas Co., 21 Cal. 2d 372.....	15
Doucette v. Vincent (C.C.A. 1), 194 Fed. 2d 834....	21, 22, 25, 28
Erie v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.....	26, 27
Fairmont Glass Co. v. Cub Fork Coal Co., 287 U. S. 474, 77 L. Ed. 439.....	22
Flewellen v. Logan (C.C.A. 5), 106 Fed. 2d 151.....	30
Harvey v. Aceves, 115 Cal. App. 333.....	15
Jacob v. City of New York, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166.....	29
Johnson v. Macias (C.C.A. 5), 193 Fed. 2d 475.....	12
Jordine v. Walling (C.C.A. 3), 185 Fed. 2d 662.....	22
Kanananakoia v. Badalamente, 119 Cal. App. 231.....	15
Krey v. United States (C.C.A. 2), 123 Fed. 2d 1008.....	34, 35
Matson Navigation Co. v. Hansen (C.C.A. 9), 132 Fed. 2d 487.....	9, 34
Mazzotta v. Los Angeles Ry. Corp., 25 Cal. 2d 165.....	15
McCarthy v. American Eastern Corp. (C.C.A. 3), 175 Fed. 2d 724	28
Menefee v. W. R. Chamberlain & Co. (C.C.A. 9), 176 Fed. 2d 828	10
Ocean Accident, etc. Corp. v. Penick & Ford (C.C.A. 8), 101 Fed. 2d 493	30
Olsen v. Alaska Packers Assn. (C.C.A. 9), 114 Fed. 2d 368.	35

	Pages
Petterson v. Alaska S. S. Co. (C.C.A. 9), 205 Fed. 2d 478..	35
Phillips v. Matson Nav. Co. (D.C. Cal.), 62 F. Supp. 247...	10, 34
Pope & Talbot v. Hawn, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143	26, 27
Rogers v. City of Burlington, 70 U. S. 654, 18 L. Ed. 79...	21
Seas Shipping Co. v. Sieracki, 328 U. S. 85, 90 L. Ed. 1099	24, 26, 28
Socony Vacuum Oil Co. v. Smith, 305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265.....	7, 8, 9, 19, 34
Storgard v. France & Canada S. S. Corp. (C.C.A. 2), 263 Fed. 545	10
Southern Pacific v. Jensen, 244 U. S. 205, 61 L. Ed. 1086..	24
Snodgrass v. United States (C.C.A. 9), 61 Fed. 2d 99.....	15
Southern Ry. Co. v. Walters (C.C.A. 8), 47 Fed. 2d 3, reversed, 284 U. S. 190	29
Spear v. Leuenberger, 44 Cal. App. 2d 236.....	15
Standard Brands v. N. Y. K. (D.C. Mass.), 42 F. Supp. 43	13
The Arizona v. Anelich, 298 U. S. 110, 56 S. Ct. 707, 80 L. Ed. 1075	10
The City of Hartford, 97 U. S. 323, 24 L. Ed. 930.....	30
The Diamond Cement (C.C.A. 9), 95 Fed. 2d 738.....	10
The Empress of France (D.C. N.Y.), 49 Fed. 2d 291.....	13
The General Pickney, 9 U. S. 281, 3 L. Ed. 101.....	35
The Indien (C.C.A. 9), 71 Fed. 2d 752.....	35
The Lottawanna, 88 U. S. 640, 21 Wall. 558, 22 L. Ed. 654.	24
The Louisville, 154 U. S. 657, 14 S. Ct. 1100, 25 L. Ed. 771	35
Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610.....	10, 13
United States v. La Franca, 282 U. S. 568, 75 L. Ed. 551...	21
Wheaton v. Sexton's Lessee, 17 U. S. 503, 4 Wheat. 503, 4 L. Ed. 626.....	11, 13

Constitutions

Constitution of the United States:

Constitution of California:

Article III, Section 2..... 23

Statutes

Pages

Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C. Sec. 1291.....	1
Judiciary Act of 1789, 1 Stat. 77	23
28 U.S.C., Section 1331.....	24, 26, 27, 28
28 U.S.C., Section 1332	26
28 U.S.C., Section 1333	23
Jones Act, Act of June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007, 46 U.S.C. Sec. 688	1, 4, 15, 21, 34
Federal Employers Liability Act, 1939 Amendment.....	10

Texts

Restatement of the Law of Torts, Volume 2, Section 281, page 734	14
--	----

No. 14,610

United States Court of Appeals

For the Ninth Circuit

BERNARD G. JESONIS,

VS.

OLIVER J. OLSON AND Co.,

Appellant,

Appellee.

BRIEF FOR APPELLANT.

I.

JURISDICTION.

This is an appeal from a final judgment of the United States District Court for the Southern District of California, Central Division (Cl. Tr., p. 71). Notice of Appeal to this Honorable Court was timely filed (Cl. Tr., p. 78). The case was a seaman's action for damages, wages, maintenance and cure on account of personal injuries under the Jones Act (Act of June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007, 46 U.S.C. Sec. 688) and the general maritime law, the District Court having jurisdiction under both provisions of law (Cl. Tr., p. 2). This Court has jurisdiction of this appeal pursuant to the Act of June 25, 1948 (c. 646, 62 Stat. 929, 28 U.S.C. Sec. 1291).

II.

QUESTIONS INVOLVED.

1. Did the trial Court err in giving to the jury instructions requested by appellee, and in refusing other instructions requested by appellant?

2. Did the trial Court err on the question of jurisdiction in taking away from the jury the maritime issue of unseaworthiness?

3. Was the jury's verdict so contrary to the weight of the evidence that a miscarriage of justice was done?

4. If the Court below properly had jurisdiction to determine the maritime issue of unseaworthiness, apart from the jury, was the Court's determination of this cause of action in appellee's favor contrary to the great weight of the evidence?

III.**STATEMENT OF THE CASE.**

The appellant, Bernard Jesonis, is an American merchant seaman. He was injured aboard appellee Oliver J. Olson & Co.'s steam schooner, the MARY OLSON, at Longview, Washington, on June 24, 1953. The vessel at the time was at a dock loading lumber in the number 4 hold.

Appellant was descending the steel ladder at the forward end of number 4 hatch when he was caused to fall into the lower hold, a distance of 20 feet, suffering severe injuries consisting of os calcis fractures

of both heels, and a back injury. Appellant was removed to Cowlitz General Hospital at Longview for treatment, and later was a patient at the Marine Hospital in San Francisco, and the Public Health Service at San Pedro, California.

Appellant's fall was caused by the fact that several rungs of the ladder he was descending were bent out of shape, and were grease and oil covered.

Appellant was off work for a period of 10 months, and still suffers from a permanent disability to his feet and back. He claimed damages for loss of wages, permanent partial disability, and pain and suffering.

IV.

SUMMARY OF ARGUMENT.

1. Appellant contends that the trial Court erred in granting certain instructions requested by appellee, over appellant's objections, particularly on the matter of "assumption of risk"; in giving an "unavoidable accident" instruction which was not within the issues; in unduly emphasizing defense instructions; in giving "formula" defense instructions; and in failing to give appellant's requested instructions on negligence and contributory negligence, and in modifying appellant's instruction on the "assumption of risk" doctrine so as to not properly state the law, particularly when coupled with appellee's erroneous instructions on this subject.

2. The Court below erred on jurisdiction in taking away from the jury the maritime issue of "unsea-

worthiness''. This cause of action, as well as the Jones Act cause of action, should have been submitted to the jury.

3. The evidence required a verdict in favor of appellant. There was no question but that the rungs of the ladder were bent, and grease and oil covered and that this caused appellant's fall. This was negligence under the Jones Act and "unseaworthiness" under the general maritime law. The verdict for appellee was a miscarriage of justice.

4. If the Court properly had jurisdiction of the "unseaworthiness" cause, then its decision on that theory should have been in appellant's favor.



V.

ARGUMENT.

1. **THE COURT BELOW ERRED IN GRANTING CERTAIN INSTRUCTIONS REQUESTED BY APPELLEE AND IN REFUSING OTHER INSTRUCTIONS REQUESTED BY APPELLANT.**
- A. The Court's instructions on the doctrine of "assumption of risk" were erroneous, and materially affected the jury's verdict.

The defense instructions given by the Court on this subject were as follows:

"You are instructed that the plaintiff, as an employee, *in the absence of negligence on the part of his employer* assumed the ordinary risks of his employment as a seaman. There is some danger of injury in every employment as there is in almost every human activity. In some em-

ployments there are more dangers normally incident to the exercise of that employment than in others. The work of a seaman on a vessel cannot be measured in the terms of employment on shore, but must be considered in the light of dangers normally incident to that employment. An employer is not liable simply because there is or may be danger normally incident to an employment. An employer is liable under the Jones Act only when he is negligent. Negligence is a relative term and must be measured according to the circumstances of the employment and the facts of each particular case.” (Appellee’s requested instruction No. 20, Cl. Tr., p. 53.) (*Italicized portion added by Court.*)

“Under the law governing this case the steamship company does not insure or guarantee its employees against the possibility of an accident. Its duty is to exercise ordinary care. In so far as it performs that duty it fulfills the law and incurs no liability for accidental injury. Inherent in the nature of the steamship business and in the work of seamen are certain hazards, but even those hazards do not make the company an insurer or change the rule of liability that I have stated. The exercise of ordinary care may be relative in that caution should increase with danger that is known or may reasonably be expected. But liability may not be imposed unless there has been proof by a preponderance of the evidence of negligence through a breach of the obligation to use ordinary care.” (Appellee’s requested Instruction No. 16, Cl. Tr., p. 51.)

Appellant objected to these instructions (R., pp. 298-300, 306-307, p. 293).

The Court modified appellant's requested instruction No. 1, the material parts of which are as follows:

"Plaintiff's action is brought under the Jones Act, an act passed by the Congress of the United States for the benefit and protection of merchant seamen, ~~and which law abolished various common law defenses formerly available to an employer in a case such as this.~~

~~Thus, the plaintiff does not assume any of the risks or hazards of his employment; he is not~~ barred from recovering damages, if he otherwise proves his case, because his negligence may have contributed in part to the accident; and he is not barred from recovering damages if he has been injured due to the negligence of a fellow servant or co-worker on the ship." (Cl. Tr., p. 25.)

The words which are crossed out were omitted in the Court's charge. Appellant contends the Court should have charged the jury as requested by him that a seaman "does not assume any of the risks or hazards of his employment." (Appellant's objections to the Court's refusal to give his instruction No. 1 as submitted appear R. pp. 305-307.)

The import of the instructions given by the Court on the vital issue of "assumption of risk" was that a seaman's work was more hazardous than the work of other workers, particularly shoreside workers, and therefore the seaman assumed such hazards incident to his employment.

The Court profoundly misunderstood and misstated the law. The *exact opposite* of what the Court in-

structed the jury is the law. Because a seaman's work is so hazardous, he does not assume the risks of his employment, except in certain instances which are not applicable to the facts of our case. The duty of care owed to a seaman is greater than that owed to shoreside employees.

The correct rule is stated in *Armit v. Loveland*, (C.C.A. 3), 115 Fed. 2d 308, at p. 311, a case which on its facts is remarkably close to ours:

"The throwing of oil about the engine room and upon the ladder leading therefrom was the natural and foreseeable result of the rotation of the engine's crank in the absence of splash plates. It was equally apparent that the slippery properties of the oil made the floor of the engine room and the treads of the ladder an unsafe place upon which to step. Any thought of assumption of risk on the part of the plaintiff is not germane to the question of the ship owner's negligence in the maintenance of the unsafe condition. *Assumption of risk is not even available as an affirmative defense to an action under the Jones Act.* * * *

* * * The same peculiar circumstances attending the employment alike require that the rules of the common law respecting proof of the employer's negligence be not visited too rigorously upon seaman. Stated conversely, *a higher degree of care is required of the employers of seamen than is required of employers of servants for work ashore.*" (Emphasis supplied.)

The leading case on the question of assumption of risk, of course, is *Socony Vacuum Oil Co. v. Smith*,

305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265. The Supreme Court said, 305 U. S. at p. 430:

“Many considerations which apply to the liability of a vessel or its owner to a seaman for the failure to provide safe appliances and a safe place to work are absent or are of little weight in the *circumstances which attend shore employment*, in relation to which the common law rules of *assumption of risk* and contributory negligence have developed.” (Our emphasis.)

Again, at p. 431, the Supreme Court says:

“There (is) no defense of assumption of risk where the seaman is without opportunity to use a safe appliance * * *.”

In the *Socony Vacuum* case, *supra*, the seaman knowingly used a defective step, when a safe way to do the work was known to him, and he was injured. The trial Court instructed the jury that the seaman did not assume the risk of the shipowner's failure to provide him with a safe place to work.

Not only is the law as stated in the foregoing cases decisive of our problem, but the facts are pertinent to our case. Appellant seaman had no choice but to use the ladder on which rungs were bent and grease and oil covered. *Those risks he did not assume.*

Nor did the trial Court cure the erroneous content of appellee's instruction No. 20 by inserting the phrase “in the absence of negligence on the part of his employer” inasmuch as plaintiff's Jones Act case was based on negligence of the shipowner, and he could not prevail if he failed to prove negligence and

proximate cause. But the “assumption of risk” doctrine was completely inappropriate to the facts of this case, and the Court should have instructed the jury that appellant *did not assume any risks*, rather than that he assumed “ordinary risks.” From the instructions given, the jury could well have received the impression that a greasy, oil covered, bent ladder was an “ordinary risk” and decided against appellant on that ground. The law is just the opposite.

It is also evident that the duty imposed on a shipowner is a greater one than that imposed on shore-side employers. One of the reasons the “assumption of risk” doctrine has been abolished with regard to maritime employment is because it is more hazardous than shoreside work. The instructions given by the Court (as submitted by appellee) state just the opposite.

The “assumption of risk” doctrine, if it is applicable at all, is not applicable to a case such as ours which rests upon failure of the shipowner to provide a safe place to work and safe, seaworthy and proper appliances. *Socony Vacuum Oil Co. v. Smith, supra*. The risks a seaman assumes are those arising from the ordinary hazards of storm and sea. Those are the hazards “normally incident” to his calling. But an unsafe ladder is not an incident “normal” to the work of a seaman. Judge Denman pointed to the difference in *Matson Navigation Co. v. Hansen* (C.C.A. 9), 132 Fed. 2d 487, at p. 488:

“No liability flows from requiring a sailor to perform his necessary sailor’s duties with the ship

rolling and lurching in a heavy storm, even though he may be injured in a fall caused by a wave sweeping across the deck. Yet the owner would be liable if, instead of performing some necessary duty, he were injured when sent by the mate across the same wave swept deck to rescue the ship's cat."

That there is no "assumption of risk" in cases like ours, and that instructions as given here therefore are completely erroneous, see also,

The Diamond Cement (C.C.A. 9), 95 Fed. 2d 738;

Menefee v. W. R. Chamberlin & Co. (C.C.A. 9), 176 Fed. 2d 828;

Storgard v. France & Canada S. S. Corp., (C.C.A. 2), 263 Fed. 545;

Phillips v. Matson Nav. Co. (D.C. Cal.), 62 F. Supp. 247;

Beadle v. Spencer, 298 U. S. 124, 56 S. Ct. 712, 80 L. Ed. 1082;

The Arizona v. Anelich, 298 U. S. 110, 56 S. Ct. 707, 80 L. Ed. 1075.

Nor can the "assumption of risk" defense be revived under the doctrine of "no negligence." It was abolished "in toto" with the 1939 amendment to the Federal Employers Liability Act (incorporated in full in the Jones Act).

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, pp. 64, 66, 63 S. Ct. 444, 87 L. Ed. 610.

What, in effect, the "assumption of risk" instructions given by the Court did were to instruct the jury

that there was “no negligence” on appellee’s part. What the Court should have done was to give proper instructions on comparative negligence only, whereby the jury could have mitigated the damages if it had found defendant negligent and plaintiff guilty of some negligence. That this was in the jury’s mind is clear from the questions it propounded to the Court when it returned to the courtroom, during its deliberations, for further instructions (Tr., pp. 396-398).

Appellant’s instruction No. 11 (Cl. Tr., p. 32) which the Court gave was the proper and sufficient instruction on this entire matter.

The “assumption of risk” instructions were so clearly wrong and were so unduly emphasized by the Court that they could not help but have materially affected the jury’s decision. Even if all other grounds fail, the error in these instructions should compel a reversal. *Wheaton v. Sexton’s Lessee*, 17 U. S. 503, 4 Wheat. 503, 4 L. Ed. 626.

B. The Court erred in giving an “unavoidable accident” instruction requested by appellee.

Over appellant’s objection (Tr., p. 298) the Court gave appellee’s requested instruction No. 18 (Cl. Tr., p. 52) as follows:

“In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident had occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution,

still no one may be held liable for injuries resulting from it.”

Appellant contended that the instruction was not within the issues (Tr., p. 298). There was here no “unavoidable accident” or even a suggestion of one. The case was clearly one of negligence and unseaworthiness. Nothing occurred which was “unavoidable.” The contrary is true. The grease and oil could have been removed and conditions corrected on deck to make the ladder grease and oil free, and the bent ladder rungs could and should have been straightened out.

Even the trial Court recognized the vice of this instruction by commenting, “There is a question always of unavoidable accident. *I have never seen one*, but they always give it.” (Tr., p. 298, emphasis supplied.) The Court agreed with appellant’s objection, and then turned around and gave the objectionable instruction because it is “always given.” This is a very poor reason for giving an erroneous instruction.

Particularly appropriate is the decision in *Johnson v. Macias* (C.C.A. 5), 193 Fed. 2d 475, p. 479:

“The trial court did not err in refusing to give a charge on ‘unavoidable accident.’ An ‘unavoidable’ accident is one which is not occasioned in any degree, directly or remotely, by lack of care. If the injury complained of could have been prevented by the exercise of reasonable prudence, it would not be the result of ‘unavoidable’ accident. There is no evidence here tending to show that plaintiff’s injuries resulted from any cause other than negligence on the part

of someone. The issue of unavoidable accident is therefore not presented.”

The “unavoidable accident” instruction or theory is almost always related to a so-called “Act of God” occurrence. *The Empress of France* (D.C. N.Y.), 49 Fed. 2d 291.

But where the injury could have been prevented by ordinary precaution, the defense of “unavoidable accident” is completely inapplicable. *Standard Brands v. N. Y. K.* (D.C. Mass.), 42 F. Supp. 43; Cf. *Tiller v. Atlantic Coast Line R. Co.*, *supra*.

It is clear that the injury to appellant could have been avoided by the use of ordinary precautions on appellee’s part. There was nothing “unavoidable” or “inevitable” about appellant’s accident.

The instruction on this point, therefore, was entirely outside the issues and the evidence, and materially affected the jury’s verdict. The giving of this instruction was prejudicial. *Wheaton v. Sexton’s Lessee*, *supra*.

C. The Court unduly emphasized “defense” instructions, misstated the law in various of these instructions, and gave improper “formula” instructions.

Appellant objected (Tr., p. 393) to appellee’s instruction No. 8 (Cl. Tr., p. 46) which stated:

“No presumption of negligence is created by reason of mere happening of an accident. Unless you can determine from preponderance of the evidence *the manner in which the accident occurred* and that it was proximately caused by negligence on the part of the defendant, it is your duty to

find for the defendant on the issue of negligence.”
(Emphasis supplied.)

There is no requirement that a jury must find “the manner in which the accident occurred.” The elements of a cause of action for negligence (and the Jones Act is an employer’s liability statute based upon negligence) are these: (1) the interest invaded is protected against unintentional invasion; (2) the conduct of the actor is negligent with respect to such interest; (3) the actor’s conduct is a legal cause of the invasion; (4) the other has not so conducted himself as to disable himself from bringing an action for such invasion. *Restatement of the Law of Torts*, Vol. 2, p. 734, Sec. 281.

The objectionable instruction goes beyond these elements of a tort, and requires the jury to find an additional element unknown to the law of negligence, which need not be found, and in fact, which perhaps could not be found. It is not necessary that the jury determine the “manner” of the accident, whether it was caused by appellant’s slipping on oil or grease, or by the bent ladder rungs, or by both. All the jury need find is that appellee was (1) negligent, and (2) that this negligence proximately caused the accident. Liability thereupon follows.

This instruction is further objectionable by its use of the formula phrase “it is your duty to find for the defendant on the issue of negligence.” Such a formula instruction, if proper at all, must state *all the elements* essential to the case of the party in whose behalf it is given. Not only did this formula instruction insert an improper element, the question of the

“manner” in which the accident happened, it failed to include such essential elements that defendant must provide a safe place to work, and safe, proper and seaworthy appliances. It must be remembered that this is a seaman’s case under the Jones Act. Therefore, all elements required to state a shipowner’s liability under the Jones Act must be included to make a formula instruction proper. Failure so to do vitiates such an instruction and constitutes reversible error.

Kanananako v. Badalamente, 119 Cal. App. 231;

Harvey v. Aceves, 115 Cal. App. 333;

Spear v. Leuenberger, 44 Cal. App. 2d 236;

Mazzotta v. Los Angeles Ry. Corp., 25 Cal. 2d 165.

Finally, instruction No. 8 is practically repetitive of appellee’s instruction No. 7 which stated (Cl. Tr., p. 46):

“Under the Jones Act, which is the statute of the United States upon which plaintiff has based a claim for damages for personal injuries, the action is founded upon a claim of negligence. In order to maintain such an action the plaintiff *must prove by a preponderance of the evidence that there was a negligent act of the defendant, and that that act proximately caused the alleged injury.*” (Emphasis supplied.)

It is objectionable on the ground of repetition.

Chutuk v. Southern Counties Gas Co., 21 Cal. 2d 372;

Snodgrass v. United States (C.C.A. 9), 61 Fed. 2d 99, 101.

Appellant objected (Tr., p. 11) to appellee's instruction No. 11 (Cl. Tr., p. 48) which stated:

“Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person. It is not sufficient for the plaintiff to prove that the accident could have been prevented by the exercise of exceptional foresight on the part of defendant. Defendant can be held liable only if the accident was caused by failure on its part to exercise ordinary care. If the weight of the evidence on this issue is in favor of the defendant, or if it is equally balanced, then your verdict must be for the defendant.”

This is also a formula instruction, and the argument and authorities addressed to appellee's instruction No. 8 is likewise applicable here.

Appellant objected (Tr., p. 393) to appellee's instructions Nos. 15 and 16 (Cl. Tr., pp. 50-51) which stated:

“Proof merely of the existence of a defective condition in equipment does not in itself establish negligence. Before recovery may be had by a plaintiff the proof must show by a preponderance of evidence not only the existence of a defective condition but, first, that such condition arose through negligence, and, second, that the particular condition was the proximate cause of injury to the plaintiff.” (No. 15.)

“Under the law governing this case the steamship company does not insure or guarantee its employees against the possibility of an accident. Its duty is to exercise ordinary care. In so far as it performs that duty it fulfills the law and incurs no liability for accidental injury. *Inherent in the nature of the steamship business and in the work of seamen are certain hazards, but even those hazards do not make the company an insurer or change the rule of liability that I have stated.* The exercise of ordinary care may be relative in that caution should increase with danger that is known or may reasonably be expected. *But liability may not be imposed unless there has been proof by a preponderance of the evidence of negligence through a breach of the obligation to use ordinary care.*” (No. 16. Emphasis supplied.)

These instructions cover the same ground reached in instructions Nos. 7, 8 and 11. The argument and authorities addressed to those instructions cover appellant’s objections to these instructions. In addition, instruction No. 16 is objectionable for the same reasons discussed under the “assumption of risk” point. No. 16 is in fact an “assumption of risk” instruction stated another way.

Appellant objected (Tr., p. 394) to appellee’s instructions Nos. 22 and 24 (Cl. Tr., pp. 54-56) which stated:

“The defense of contributory negligence has been pleaded by the defendant in this case. To establish this defense the burden is upon the de-

fendant to prove by a preponderance of the evidence that the plaintiff was negligent and that such negligence contributed in some degree as a proximate cause of injury. This proof may be established, like other proof, through a witness or witnesses produced by the opposing party. If the burden of proving contributory negligence has been fulfilled, then the jury must make the further determination of the proportion of negligence on the part of each party which contributed to the happening of the accident, if any.” (No. 22.)

“The plaintiff testified he slipped on the ladder. Your problem is to determine whether the slip was caused by the negligence of the defendant or by the negligence of the plaintiff. If you determine that both plaintiff and defendant were negligent then it will be necessary for you to determine and apportion the negligence between plaintiff and defendant.” (No. 22. Italicized portion added by Court.)

“The defendant here has pleaded that the plaintiff was contributorily negligent. Contributory negligence means simply negligence on the part of the plaintiff which, cooperating in some degree with the negligence of another, helps in proximately causing the injuries suffered by the plaintiff. One of the questions for you to determine is whether the plaintiff was negligent and whether his own negligence proximately caused or contributed to the happening of the accident. You must also determine whether the plaintiff’s negligence was the only cause of the accident. If you should find that to be true, then he can recover no damages. If, however, you find

that negligence of the plaintiff contributed only in part to the happening of the accident, then you must determine the amount or proportion in which his own negligence contributed to the happening of the accident. That finding is controlling in the determination of damages, if any, as will be explained later.” (No. 24.)

These instructions are practically identical. The argument which appellant has previously addressed to the vice of repetitious instructions is applicable here.

D. The Court erred in failing to give instructions requested by appellant.

Appellant objected to the Court’s failure to give requested instructions which we will now discuss (Tr. p. 394).

Appellant’s requested instruction No. 1 on the question of assumption of risk was a proper statement of the law, and should have been given. *Socony Vacuum Oil Co. v. Smith, supra*. This point is fully discussed, ante, pp. 7-9.

The Court should have given appellant’s requested instruction No. 3 on negligence (Cl. Tr., p. 26):

“Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one’s property or person.”

This instruction properly states the law and is the approved BAJI instruction on negligence. Instead, the Court gave appellee's instruction No. 11 (Cl. Tr., p. 48), the objectionable features of which we already have discussed, *supra*, p. 16. Instruction No. 11 also contained the erroneous "formula" statement.

The Court should have given appellant's proposed instruction No. 10 on contributory negligence (Cl. Tr., p. 31):

"In this case, defendant claims that plaintiff was guilty of contributory negligence. The burden is upon defendant to prove this defense by a preponderance of the evidence. If defendant fails to discharge such a burden, then the defense of contributory negligence should be completely disregarded by you in reaching a verdict."

This is also an approved BAJI instruction. Instead, the Court gave appellee's instructions Nos. 22 and 24, the objections to which we have discussed, *ante*, pp. 17-19.

That the Court was unduly favorable to the defense side of the case further appears from its comment to the jury after the defense verdict was returned, "*I think you arrived at a proper verdict.*" (R., p. 401. Emphasis supplied.)

All in all, appellant contends that the Court's charge, taken in its entirety, unduly emphasized the defense side of the case, was unfair to appellant, materially affected the jury's verdict, and amounts to reversible error.

2. THE COURT ERRED ON JURISDICTION IN TAKING AWAY FROM THE JURY THE MARITIME ISSUE OF UNSEAWORTHINESS.

Appellant's complaint contained a count based upon negligence under the Jones Act and a second count for unseaworthiness under the general maritime law (Cl. Tr., pp. 5-6).

Appellee moved to transfer this second cause of action to the admiralty side of the Court (Cl. Tr., p. 14), which motion the Court granted (Tr., pp. 3-4).

The Court refused to read appellant's memorandum on this issue (Tr., p. 3), which contained authority that the issue of unseaworthiness was one which the jury should be allowed to pass upon, even though there was no diversity of citizenship between the parties (Cl. Tr., p. 24).

Since a question of law apparent on the record is involved, and appellant did not waive his position in any respect, the ruling by the trial Court on the motion is subject to review in this Court. *United States v. La Franca*, 282 U. S. 568, 570, 75 L. Ed. 551, 554; *Rogers v. City of Burlington*, 70 U. S. 654, 18 L. Ed. 79, 82. Further, since the question presented is one of jurisdiction of the District Court, it can be considered by this Court on appeal even though the point had not been raised below by the parties. *Doucette v. Vincent* (C.C.A. 1), 194 Fed. 2d 834, p. 836.

In his motion for new trial, appellant stated as a ground the trial Court's ruling in taking away from

the jury the issue of unseaworthiness (Cl. Tr., p. 73). The Court denied the motion (Cl. Tr., p. 77). The appeal was from the judgment (Cl. Tr., p. 78). The order of the trial Court in denying the motion is reviewable to determine this question of law: did the trial Court have jurisdiction, in the absence of diversity of citizenship of the parties, to decide the second cause of action for unseaworthiness on the law side, with a jury? *Bass v. Baltimore & Ohio R. Co.* (C.C.A. 7), 142 Fed. 779, p. 780; *Fairmount Glass Co. v. Cub Fork Coal Co.*, 287 U. S. 474, 77 L. Ed. 439.

Appellant contends that the question propounded is answerable in the affirmative. The trial Court apparently relied on *Jordine v. Walling* (C.C.A. 3), 185 Fed. 2d 662, in support of its ruling (R., p. 3), and did not search further into the subject, nor would the trial Court listen to counsel for appellant on this subject. We concede that the *Jordine* case is authority for the trial Court's ruling.

However, there is more convincing, later, and sounder authority in other circuits, in the Supreme Court, and in this Court to support appellant's position that the issue of unseaworthiness was one for the jury.

Doucette v. Vincent, *supra*, is logical and compelling authority supporting appellant's position. There, in a scholarly and well reasoned opinion Judge Magruder for the Court analyzes the problem, considers and rejects the rationale of the *Jordine* case as an "unfortunate technicality" (194 Fed. 2d, p. 840) and finds that the District Courts have jurisdic-

tion, under the Constitution and the Judicial Code, to determine admiralty causes at law, with a jury, absent diversity of citizenship.

The claim which appellant set up in his second cause of action (and in his third cause of action for maintenance, but which he abandoned, because he was not entitled to maintenance, appellee having already paid it) was for damages based on the vessel's unseaworthiness, a cause of action cognizable in admiralty.

The Constitution, Article III, Section 2, provides that the judicial power of the United States extends "to all cases of admiralty and maritime jurisdiction." But at the time the Constitution was adopted, it was well known that many cases, which because of their subject matter were cognizable in a Court of admiralty, also might be prosecuted in a Court of common law (194 Fed. 2d P. 841). This concurrent jurisdiction was recognized and preserved in the Judiciary Act of 1789, 1 Stat. 77, which vested in the District Courts "exclusive * * * admiralty and maritime jurisdiction" coupled with a provision "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." (194 Fed. 2d, p. 841). The content of the "saving clause" was preserved by the 1948 revision of the Judicial Code, 28 U. S. C., Sec. 1333.

The Constitution not only extended the judicial power of the United States to all cases of admiralty and maritime jurisdiction, it also prescribed the substantive law to be applied in such cases.

“That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall ‘extend to all cases of admiralty and maritime jurisdiction.’ * * * *The Constitution must have referred to a system of law coextensive with and operating uniformly in, the whole country.* It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed * * *.” (Emphasis supplied.) Mr. Justice Bradley for the Court in *The Lottawanna*, 88 U. S. 640, 21 Wall. 558, 22 L. Ed. 654, 662. See also *Southern Pacific v. Jensen*, 244 U. S. 205, 61 L. Ed. 1086.

Thus, whether a suit of “admiralty or maritime jurisdiction” be brought in law or admiralty, in state or federal court, the federal maritime law determines the substantive rights of the parties. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, p. 88, 90 L. Ed. 1099, p. 1103.

But if brought on the law side of the federal Courts, or in the state Courts, *it is the common law remedy “which is saved.”* Since a maritime cause is cognizable at common law, since the Constitution makes the grant of maritime jurisdiction to the federal Courts, and since 28 U. S. C., Sec. 1331, provides

for jurisdiction of "civil actions" which "arise under the Constitution," jurisdictional amount of \$3,000.00 being present (which it was in our case), it follows that an action for damages civil and maritime based on unseaworthiness may be brought at law in the federal Courts, absent diversity of citizenship (194 Fed. 2d, p. 843).

"Since a suit on a claim under the general maritime law asserts a substantive right 'under controlling federal law,' * * * what is the sense, in such a case, of requiring in addition that diversity of citizenship be present?"

Doucette v. Vincent, 194 Fed. 2d at p. 843.

With regard to the question of jury trial, the Court had this to say, 194 Fed. 2d, p. 846:

"The only important difference in trying the case on the law side under 28 U. S. C., Sec. 1331, is that plaintiff gets a jury trial, as he would also if the case were tried under Sec. 1332. Conceivably, as a matter of policy, it would be better to try these cases, founded on the general maritime law, in accordance with the historic procedures of courts of admiralty, before a judge without a jury. Congress could have so required, for the parties do not have a constitutional right to a jury trial in cases within the cognizance of a court of admiralty. But Congress made the opposite policy decision way back in 1789, in the famous saving clause, whereunder suitors with claims cognizable in admiralty were also permitted, as theretofore, *to pursue a common law remedy in any common law court of competent jurisdiction, with the incident of a jury trial.*

And ever since 1789 that has been so.” (Emphasis supplied.)

In *Seas Shipping Co. v. Sieracki*, *supra*, a stevedore maintained an action for damages at law for personal injuries, based upon unseaworthiness of a vessel. It does not appear whether there was diversity. The Supreme Court held that a stevedore had the same right as a seaman to maintain such an action, independent of negligence. The Supreme Court applied “approved rules of the federal maritime law” in reaching its conclusion. The jurisdictional result is reachable under 28 U. S. C., Sec. 1331.

In *Pope & Talbot v. Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143, a ship’s carpenter injured aboard a vessel in navigable waters of the United States, within the state of Pennsylvania, recovered damages in an action at law with trial by jury alleging both negligence of the vessel’s owners and unseaworthiness of the vessel. The Supreme Court held the case to be governed by federal maritime law, both in its substantive and procedural aspects, and disallowed the contributory negligence defense as a bar to the action over appellant’s contention that Pennsylvania law should control, and under which the contributory negligence doctrine would be a defense. As part of its argument, appellant argued that there was diversity of citizenship, that the action therefore was under 28 U. S. C., Sec. 1332, and that the federal Courts should follow state law under the *Erie v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 doctrine.

The Supreme Court rejected this contention, stating that the *Erie-Tompkins* case was designed to end just such unfairness as appellant contended for. Had the *Hawn* case been brought on the "admiralty" side, there is no question but that the federal maritime law would forbid the contributory negligence doctrine as a bar. Since the case is on the "law" side, there is no reason in justice or logic to resuscitate that discredited defense on this side of the Court. Otherwise a party's rights would be determined by the fortuitous chance of what "side of the Court" he was on when that should have no place at all in the result of a case. The law to be applied, said the Court, is the federal maritime law, and its rules are the same whether the action be at law or admiralty.

Whether there was jurisdiction of the *Hawn* case on the law side under 28 U. S. C., Sec. 1331, as a case arising "under the Constitution, laws or treaties of the United States" was a question left open by the Court. But the impact of the decision would seem to leave it clear that jurisdiction can be founded on that provision.

To answer such a question in the negative would be to say that a maritime case brought in a state Court at law must be decided under federal admiralty principles with a jury allowable, while if brought in the federal Court without diversity, a jury is not allowable, even though federal law is the source of the right in both Courts and determinative of the parties' rights. How can there be greater rights to a litigant (as trial by jury of a maritime cause) in

a state Court where he invokes a federal law than in the federal Court where the jurisdictional grant of such power (over admiralty and maritime cases) is placed by the Constitution?

Certainly, as Judge Magruder points out in the *Doucette* case, *supra*, such a result would be an "unfortunate technicality."

This Court in the recent case of *Lahde v. Soc. Armadora Del Norte* (C.C.A. 9, Mar. 16, 1955), No. 14,155, had occasion to consider the "purpose" of the *Sieracki* case, *supra*, and said:

"The 'purpose' of the *Sieracki* case was the determination of the stevedore's right to recover in a civil action at law for an injury due to the vessel's unseaworthiness."

This Court did not have occasion to reach the question of whether such jurisdiction existed at law absent diversity, but the assumption this Court seems to have made is that which the Supreme Court made as pointed out in the *Doucette* case, *supra*, namely, that there is such jurisdiction at law absent diversity, and it must be under 28 U. S. C., Sec. 1331, as a case "arising under the Constitution, laws or treaties of the United States."

An action for damages based on negligence under the Jones Act and unseaworthiness under the general maritime law may be joined in one complaint and tried without the plaintiff seaman being required to make an election. His recovery might be predicated on one theory or the other or both, although there could be but a single recovery. *McCarthy v. Ameri-*

can Eastern Corp. (C.C.A. 3), 175 Fed. 2d 724; *Badado v. Lykes Bros.* (C.C.A. 2), 179 Fed. 2d 943; *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, 71 L. Ed. 1069.

This being so, an orderly administration of justice would dictate that if such a case is brought at law with a jury, that the jury determine the entire controversy. Otherwise, a situation might occur where the Court would determine the cause of action left to it in a manner contrary to the jury determination of that part of the case it was to decide. Or as here, the Court quickly and without argument from counsel, followed the jury's verdict (R., p. 401), thereby making meaningless its duty to exercise a considered and independent judgment of the unseaworthiness count.

We conclude that the District Court had jurisdiction at law of the unseaworthiness count, and erred in taking away this count from the jury. The error is one of jurisdiction, materially affecting appellant's rights, and therefore reversible. Cf. *Jacob v. City of New York*, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166.

3. THE JURY'S VERDICT WAS CLEARLY AGAINST THE WEIGHT OF THE EVIDENCE AND AMOUNTED TO A MISCARriage OF JUSTICE.

While appellant recognizes the reluctance of any appellate court to disturb a jury verdict where factual questions are in dispute, it will reverse such a verdict where it is so clearly contrary to the weight of the evidence as to be a miscarriage of justice to allow such a verdict to stand. *Southern Ry. Co. v.*

Walters (C.C.A. 8), 47 Fed. 2d 3, reversed, 284 U. S. 190; *Ocean Accident, etc. Corp. v. Penick & Ford* (C.C.A. 8), 101 Fed. 2d 493; *The City of Hartford*, 97 U. S. 323, 24 L. Ed. 930; *Flewellen v. Logan* (C.C.A. 5), 106 Fed. 2d 151, p. 152.

It is not appellant's purpose to review the evidence at any great length, but merely to point briefly to those places in the record where the *undisputed* evidence, and the *credible* evidence demonstrate that the verdict should have gone for appellant, and in fact was the only verdict which the evidence permitted.

Three seamen who testified by deposition were unshaken in their testimony that the ladder on which appellant fell was oily and greasy and the top rungs bent at the time.

Howard W. Sullivan (R., pp. 7-51) testified that he saw appellant fall (R., p. 20), that he fell from the second or third rung of the ladder (R., p. 21), that he took off appellant's boots, which were greasy (R., p. 22), that the coaming where appellant fell was greasy from the tiller chains which ran down each side of the main deck and were slushed with grease (R., pp. 24-25), that the base of the crane above the ladder where appellant fell was greasy from drippings and from a greasy bull rope which was used over the coaming at the head of the ladder (R., pp. 25-26), that no orders were given or time allowed to clean up the grease (R., p. 26), that the second and third rungs of the ladder were bent (R., p. 27), and that there was a lot of oil and grease on the coaming and the ladder where appellant fell (R., p. 28).

On cross-examination, Sullivan corroborated the presence of oil and grease on the ladder when appellant fell (R., p. 37), and that the ladder rungs were bent (R., p. 39).

Appellee also produced a written statement taken from Sullivan by representatives of appellee at St. Helens, Oregon, on July 26, 1953, which stated that there was considerable grease and oil on the coaming at the head of the ladder from the drippings of the crane, and the bull rope. Taken so soon after the accident, prior to any thought of litigation, and *by the company itself*, this statement has the ring of truth—truth which spells appellee's liability.

Edward O. Gschwind (R., pp. 54-89) testified that grease dripped from the tiller chains and crane on the deck at the head of the ladder where appellant fell (R., pp. 62-63), that the bull rope rubbing over the coaming left grease (R., p. 63), that the top rungs of the ladder were bent because of loads hitting them (R., p. 67), and that he saw appellant fall from the first or second rung of the ladder (R., p. 69).

On cross-examination he was unshaken: that there was "so much grease on the deck area, you couldn't help but step in it" (R., p. 81), and that there was grease from the bull rope (R., p. 86) on the deck and coaming.

Nils G. Gelfgren was likewise positive of the conditions which spell out liability. He saw appellant fall (R., p. 94), and the ladder rungs were greasy, oily and bent (R., p. 100).

These witnesses all identified the photographs, appellant's exhibits 1, 2, 3 and 4 (R., pp. 18-19) which clearly and unmistakably show the *bent ladder rungs*, and which all the witnesses say was the condition of the ladder when appellant fell.

Appellant Jesonis himself testified that the bull rope was slushed with oil and rubbed over the coaming at the forward end of number 4 hatch (R., p. 132), that there was oil and grease on the ladder and coaming when he fell (R., pp. 135-136), that the seamen were never ordered to clean up the oil and grease (R., p. 136), that the second and third rungs of the ladder were bent (R., p. 136) as a result of being hit with a load of lumber, that he thinks he fell from the second rung,

“Because I usually put it way down there so I can get the other foot on the first rung, so as I was swinging over, the other foot slipped off the rung, and when the weight caught my hands, it jerked my hands.” (R., p. 141.)

He fell 20 feet, his foot just slipping off the ladder rung (R., p. 142). (We will not review the evidence related to injuries or damages.)

Peter Johnson, second mate on the MARY OLSON, was called as a witness by appellee. He had difficulty in remembering whether he gave one or two statements to representatives of the company, and whether it was up north or when the vessel returned south (R., pp. 265-270). He conceded that the second and third rungs of the ladder were bent as a result of being hit by loads (R., p. 285).

Mr. Johnson denied the presence of oil or grease where appellant fell, declared that the ladders though bent were "in good condition," that it was up to the master and chief mate to order their repair (R., pp. 286-287). He conceded however that grease got on the deck from the tiller chains (R., pp. 286-287).

However, nowhere is there any showing that Mr. Johnson himself descended the ladder at, before or immediately after appellant fell. He is not in a position, therefore, as are appellant's witnesses, to describe the condition of the ladder at the time of the accident. Mr. Johnson's testimony is largely what may be called "negative."

On appellee's case, there was a question by Mr. Harrison, its counsel, and an answer by Mr. Johnson which are significant and revealing, and which we believe cast a substantial doubt on the rest of Mr. Johnson's testimony that the area where appellant fell was grease and oil free.

The following appears in the record at page 256:

Q. (Mr. Harrison.) Did any of them (seamen) complain to you about any alleged oil in that space between the hatch coaming and the ladder?

A. (Mr. Johnson.) *Yes.*" (Emphasis supplied.)

The logical inferences to be drawn from Mr. Johnson's testimony compel a finding of negligence.

Appellee called as a witness Christian E. Andres, chief mate of the MARY OLSON when appellant was injured.

He denied that there was oil or grease in the area where the ladder went down into the hatch, but admitted that the ladder rungs were bent (R., p. 352). The witness signed an accident report soon after appellant's injury which states that the latter "slipped on the ladder." (R., p. 355, Plaintiff's Exhibit No. 21.)

It is appellant's contention that the witnesses for him, coupled with the testimony of appellee's witnesses, make out such a compelling case of liability that a verdict for appellee was clearly improper and contrary to justice.

That there is liability under the Jones Act in a case where the facts are such as here see *Armit v. Loveland*, *supra*; *Phillips v. Matson*, *supra*; *Matson Navigation Co. v. Hansen*, *supra*; *Socony Vacuum Oil Co. v. Smith*, *supra*; *Krey v. United States* (C.C.A. 2), 123 Fed. 2d 1008.

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4. IF THE TRIAL COURT PROPERLY HAD JURISDICTION, IN THE ABSENCE OF A JURY, TO DECIDE THE QUESTION OF UNSEAWORTHINESS, THEN AN APPEAL IN ADMIRALTY IS PRESENTED ON THIS QUESTION, AND THIS COURT HAS JURISDICTION TO DECIDE DE NOVO WHETHER THE TRIAL COURT'S VERDICT WAS PROPER. APPELLANT CONTENDS THE VESSEL WAS UNSEAWORTHY AND THE VERDICT SHOULD HAVE GONE FOR HIM ON THE UNSEAWORTHINESS COUNT.

We contend that the unseaworthiness cause should have gone to the jury as discussed, *ante*, pp. 21-29. However, if the Court decides this point adversely to appellant, then an admiralty appeal is presented on the unseaworthiness question, and this Court may con-

sider the entire case and all the evidence *de novo* and decide the question of liability because of unseaworthiness for itself. *The General Pickney*, 9 U. S. 281, 3 L. Ed. 101; *The Louisville*, 154 U. S. 657, 14 S. Ct. 1100, 25 L. Ed. 771; *Brooklyn Eastern Dist. Term. v. United States*, 287 U. S. 170, 53 S. Ct. 103, 77 L. Ed. 240; *The Indien* (C.C.A. 9), 71 Fed. 2d 752; *Olsen v. Alaska Packers Assn.* (C.C.A. 9), 114 Fed. 2d 368; *Petterson v. Alaska S. S. Co.* (C.C.A. 9), 205 Fed. 2d 478.

The evidence reviewed under the previous point demonstrates a case of liability for unseaworthiness. The *credible* evidence proves the ladder to have been oil and grease covered. The *uncontradicted* evidence proves the ladder rungs to have been bent out of shape. Either or both of these situations amounts to unseaworthiness. *Krey v. United States*, *supra*; *Lahde v. Soc. Armadora Del Norte*, *supra*.

This Court sitting *de novo* on the question of unseaworthiness (if it decides the jurisdictional point adversely to appellant) has the power to enter its own independent decision on this point, and appellant contends the evidence calls for a decree in his favor on this cause of action, with the matter of damages to be decided, either on a remand to the District Court or here.

VI.

CONCLUSION.

Appellant respectfully contends that material error was committed below and that the cause should be reversed and remanded for a new trial, or in the alternative that this Court should enter its decree in appellant's favor on the count for unseaworthiness.

Dated, Los Angeles, California,

April 28, 1955.

Respectfully submitted,

HERBERT RESNER,

Attorney for Appellant.

No. 14,610

In the
United States Court of Appeals
For the Ninth Circuit

BERNARD G. JESONIS,

Appellant,

VS.

OLIVER J. OLSON AND CO.,

Appellee.

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SUBJECT INDEX

	Page
I. Preface	1
II. Statement of the Case.....	2
The Evidence	3
The Instructions	6
A. Assumption of Risk.....	6
B. Unavoidable Accident	11
C. Alleged Formula Instructions.....	11
D. Instructions Not Given.....	15
Jurisdiction of the Maritime Issue of “Unseaworthiness”.....	16
Conclusion	21

TABLE OF AUTHORITIES CITED

CASES	Pages
Arizona, The, v. Anelich, 298 U.S. 110, 80 L.ed. 1075 at page 1081	7, 9
Armit v. Loveland (C.C.A. 3), 115 Fed. 2d 308.....	9
Beadle v. Spencer, 298 U.S. 124, 56 S. Ct. 712, 80 L.ed. 1082....	9
Catherall v. Cunard SS Co., 101 F. Supp. 230 (D.C., S.D.N.Y., 1951)	18
Chutuk v. Southern Counties Gas Co., 21 Cal. 2d 372.....	12
Diamond Cement, The (C.C.A. 9), 95 Fed. 2d 738.....	9
Doucette v. Vincent, 194 Fed. 2d 834.....	16, 18
Douglas v. Southern Pac. Co., 203 Cal. 390.....	15
Ferris v. American South African Line, Inc., 1945 AMC 1296 (D.C. S.D.N.Y., 1945).....	18
Franklin v. Skelly Oil Co., 141 Fed. 2d 568, 571 (10 Cir.).....	13
Harvey v. Aceves, 115 Cal. App. 333.....	15
Iroquois, The, 194 U.S. 240.....	7, 9
Jordine v. Walling, 185 F. 2d 662 (C.A. 3, 1952).....	16, 17, 18
McDonald v. Cape Cod Trawling Corporation, 71 F. Supp. 888 (D.C. Mass. 1947).....	18
Menefee v. W. R. Chamberlin & Co. (C.C.A. 9), 176 Fed. 2d 828	9
Modine v. Matson, 128 F. 2d 194 (C.A. 9, 1942).....	16, 17, 20
Mullen v. Fitz Simons and Connel Dredge and Dock Co., 191 F. 2nd 82 (C.A. 7, 1952), cert. denied 342 U.S. 888 and 344 U.S. 933.....	18
Paduano v. Yamashita Nisen Kabushiki Kaisha, 120 F. Supp. 304	19
Phillips v. Matson Nav. Co. (D.C. Cal.), 62 F. Supp. 247.....	9
Pope & Talbot v. Hawn, 346 U.S. 406, 74 S.Ct. 202, 98 L. ed. 143	19

	Pages
Snodgrass v. United States (C.C.A. 9), 61 F.2d 99.....	12
Snow v. Harris, 41 Cal. App. 34.....	13
Socony Vacuum Oil Co. v. Smith, 305 U.S. 424, 59 S.Ct. 262, 83 L.ed. 265.....	9
Storgard v. France & Canada S. S. Corp. (C.C.A. 2), 263 Fed. 545	9
Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, pp. 64, 66, 63 S.Ct. 444, 87 L.Ed. 610.....	10
Watlack v. North Atlantic & Gulf SS Co., 107 F. Supp. 162 (D.C. Penn. 1952).....	18

STATUTES

Jones Act, Act of June 5, 1920, C. 250, Sec. 33, 41 Stat. 1007, 46 U.S.C., Sec. 688.....	Throughout brief
Title 28, United States Code, Sections 1331, 1332.....	17, 19

TEXTS

Benedict on Admiralty, 6th Ed., Vol. 4, page 200.....	18
Restatement of Torts, Section 466.....	6
Witkin—Summary of California Law, Sixth Edition, page 788	6

No. 14,610

In the

United States Court of Appeals

For the Ninth Circuit

BERNARD G. JESONIS,

Appellant,

vs.

OLIVER J. OLSON AND CO.,

Appellee.

Brief for Appellee

I.

PREFACE

Appellant has posed four questions which he alleges are involved in this appeal. They are as follows:

1. Did the trial Court err in giving to the jury instructions requested by appellee, and in refusing other instructions requested by appellant?

2. Did the trial Court err on the question of jurisdiction in taking away from the jury the maritime issue of unseaworthiness?

3. Was the jury's verdict so contrary to the weight of the evidence that a miscarriage of justice was done?

4. If the Court below properly had jurisdiction to determine the maritime issue of unseaworthiness, apart from the jury, was the Court's determination of this cause of action in appellee's favor contrary to the great weight of the evidence?

The last two questions posed by appellant are necessarily dependent upon what the evidence actually was at the trial, and the answer to the first question is also somewhat dependent upon the facts of the case. Consequently it is deemed appropriate to discuss first the evidence upon which the jury determined that there was no liability of the steamship owner in this case.

II.

STATEMENT OF THE CASE

The appellant, Bernard G. Jesonis, a merchant seaman, was injured aboard the steam schooner MARY OLSON at Longview, Washington, on June 24, 1953. The vessel was at the dock, and lumber was being loaded into No. 4 hold.

When appellant was returning to his job in No. 4 hold after a "coffee break" he started to descend the ladder leading into No. 4 hold. In so doing he swung one leg over the hatch coaming and placed his foot upon a ladder rung variously estimated to be the second or third rung. This position required him to swing his other leg over the hatch coaming in a manner described by one witness as being at least waist high (R., p. 83, lines 16-23). After his leg was swung over the coaming, for some reason admittedly unknown to the appellant, he fell from the ladder.

The Evidence

The appellant was wearing gloves which were greasy when he started to descend the ladder (R., pp. 44-48). Expert seamen testified that it is not good seamanship to wear gloves when descending a steel ladder (R., p. 252, lines 19-26; p. 253, lines 1-3; p. 336, lines 8-17). The appellant claimed that there was oil on his shoes which he had picked up from walking on the deck. There was substantial evidence that the decks were not oily in any of the passageways where appellant had been (R., p. 246, lines 1-17). The evidence was uncontradicted that the shoes the appellant had on at the time had been carefully preserved in a seabag after the accident (R., p. 78, lines 14-17; p. 79, lines 14-21; p. 80, lines 9-12), and in fact prior to the trial had been given to appellant's attorney "for evidence" (R., p. 369, lines 6-12). The shoes were never introduced by the appellant in his case, and in fact were kept entirely away from the trial until mentioned by counsel for appellee.

The evidence was that there were some slight bends in the ladder rungs, and yet it was never claimed by the appellant himself that these bends in any way caused his fall.

On this evidence the jury found that there was no negligence on the part of the appellee that proximately caused the appellant to fall.

The case is a simple negligence case, since the jury never reached the question of contributory negligence or damages, having found first that there was no negligence on the part of the appellee which proximately caused the injury. There were conflicts in the evidence with regard to the oil on the deck, and possibly on the hatch coaming and ladder rungs, but there was convincing evidence that the deck space (R., p. 325, lines 13-22), hatch coaming (R., p. 251, lines 16-20; R., p. 333, lines 21-24), and ladder rungs (R., p. 253, lines 11-13; R., p. 333, lines 17-20) were free from any grease

or oil. The sailors testified that the hull rope that runs to the crane was slushed with oil and the oil got on the hatch coaming. This was emphatically denied by the mate, Mr. Johnson (R., p. 279, lines 11-14).

The bend in the ladder rungs was such that an expert seaman testified: "When they are bent that little, that doesn't do any harm to go up and down it." (R., p. 287, lines 1-2). See also R., 352, lines 10-11, where the first mate testified the rungs were bent only a little bit. The jury was shown pictures of the ladder (Pl. Ex. 1, 2 and 3) and presumably concluded, as did the Court, that the slight bend (if such can be called a bend) in the rungs did not constitute an unsafe condition.

The ladder was the customary type used on ocean going vessels (R., p. 254, lines 3-13) and there was no evidence to the contrary to show unseaworthiness.

The jury apparently chose to believe the evidence presented by the appellee, and on that basis found no negligence on the part of the appellee. The Court apparently believed the evidence presented by the appellee with regard to the seaworthiness of the ladder, and consequently found the vessel to be seaworthy.

These were solely questions of fact, determined by the jury and the Court on conflicting evidence, in favor of the appellee. No citation of authority is necessary to support the statement that this Court will not substitute its judgment on such questions for that of the jury or the trial judge.

The very brief summary of the evidence given above covers all of the points in this connection raised by appellant in his opening brief. However, during the trial the appellant also contended that improper lighting contributed to his accident, and also that the Texacote applied to the decks of the vessel was picked up on his shoes and con-

tributed to his fall. Suffice it to say that the officers of the vessel described the lighting at great length and contradicted the evidence presented by the plaintiff with regard thereto (R., p. 237, lines 6-25; pp. 238, 239, and 240, lines 1-13). With regard to the Texacote there was ample evidence that it was dry on the night of the accident—not only by the testimony of the mates (R., p. 329, lines 14-25; pp. 330 and 331), but also by the testimony of the manufacturer's representative (R., pp. 358, 359, 360).

Mr. Resner, counsel for appellant, has quoted in his brief a portion of the testimony which is an obvious mis-transcription by the reporter. On page 33 of appellant's brief, he quoted the direct examination of Mr. Johnson as follows:

“Q. Did any of them complain to you about any alleged oil in that space between the hatch coaming and the ladder?

A. *Yes.*”

The preceding question and the following question make it obvious that the answer was “No”. The following question was:

“Q. Did any of them complain to you whatsoever about the condition of the vessel at that time?

A. Not at that time.” (R. 256, lines 7-9)

In addition it was clearly shown by the previous testimony of the witness that there was no oil in the area between the hatch coaming and the ladder (R. 246, lines 5-17). Mr. Andres, the chief mate, testified that the Union delegate made no complaint with regard to the working conditions around No. 4 hatch (R., p. 338, lines 20-26). All of this goes to show that counsel for appellant, in his diligent search to find one small piece of evidence upon which to base his claim of error, has found only an error in the transcription of one word.

It is respectfully submitted that the evidence fully supports the verdict of the jury finding no negligence on the part of appellee which proximately contributed to the accident, and further fully supports the judgment of the trial Court on the unseaworthiness cause, wherein he found no unseaworthiness and rendered judgment in favor of the appellee (R., p. 401, lines 16-17).

Consequently the answers to Questions 3 and 4 posed by the appellant should be in the negative.

The Instructions

A. ASSUMPTION OF RISK

The appellant contends that the Court gave an instruction on the doctrine of "assumption of risk". This is not the case at all. The doctrine of "assumption of risk" involves assuming a risk caused by the negligent conduct of the defendant. It involves the "assumption of risk of negligent conduct". *Within—Summary of California Law*, Sixth Edition, page 788. Restatement of Torts, Section 466.

The Court, of course, gave no such instruction. The Court specifically declared that "the plaintiff as an employee, *in the absence of negligence on the part of his employer*, assumed the *ordinary risk* of his employment as a seaman".

The Court went on to explain that every human activity has dangers, and when a man goes to sea he exposes himself to certain dangers as does everyone who undertakes any physical task whatsoever. The Court emphasized that it is only the *ordinary* risk which creates no liability, and that risks created by a negligent act do create liability.

For this court's convenience the entire instruction to which appellant objects is reprinted here.

"You are instructed that the plaintiff, as an employee, *in the absence of negligence on the part of his employer* assumed the *ordinary risks* of his employ-

ment as a seaman. There is some danger of injury in every employment as there is in almost every human activity. In some employments there are more dangers normally incident to the exercise of that employment than in others. The work of a seaman on a vessel cannot be measured in the terms of employment on shore, but must be considered in the light of dangers normally incident to that employment. An employer is not liable simply because there is or may be danger normally incident to an employment. An employer is liable under the Jones Act only when he is negligent. Negligence is a relative term and must be measured according to the circumstances of the employment and the facts of each particular case."

The language of this instruction is no more than a paraphrase of the language of the Supreme Court Decision in *The Iroquois*, 194 U.S. 240. In that case, at page 243 the court states: "A seafaring life is a dangerous one, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risk of such employment is peculiarly applicable to the case of seamen." Although this case was decided prior to the enactment of the Jones Act, it has been held to the law after the Jones Act. *The Arizona v. Anelich*, 298 U.S. 110, 80 L.ed. 1075 at page 1081.

The appellant argues in circles in his brief at page 9. He agrees first, that seamen assume the risk "normally incident" to his calling, and then ignores the verdict of the jury when he states that an "unsafe" ladder is not an incident normal to his calling. The jury found, and the court found, that the ladder was not "unsafe". How can it be said that the climbing or descending of a ladder is not an "incident normal to a sailor's calling"?

For the instruction to have been erroneous there would necessarily have to have been an admission on the part of

the appellee that there was negligence, or that the ladder was unsafe. The question of negligence was still before the jury when the instruction was given, and it is presumed that it was decided that no negligence existed and the ladder was safe. The court specifically qualified the instruction with the words "in the absence of negligence" and "ordinary risk".

Appellant's contention that from this instruction the jury could have believed that "a greasy oil covered, bent ladder was an "ordinary risk" (Pl. Brief 9) is not only far-fetched but was specifically negated in the Court's giving of appellant's proposed instruction No. 6* (Cl. Tr. 29; R. 382) wherein the Court instructed the jury that if plaintiff proved "one or more of these contentions, * * * and if any "were the proximate cause of plaintiff's injuries then a verdict should be found for the plaintiff."

It is submitted that the instruction was clearly a correct statement of the law. To accept appellant's argument that a seaman assumes no risk in going to sea is to say that a vessel is as safe as the grave, or that the employer is an insurer of the seaman's safety. Obviously neither is the fact nor the law.

*Plaintiff contends that defendant was negligent in various ways as follows:

1. That the ladder and deck where plaintiff was working at the time of his accident were covered with oil and grease, known to defendant, and defendant failed to take any action to clean up or remove the oil and grease.

2. That the ladder which plaintiff was descending had bent and defective rungs, no side supports, and failed to provide safe footing for plaintiff as he descended into the number 4 hold.

3. That the area was improperly and insufficiently lighted and plaintiff could not clearly see as he descended into the hold.

If you find that plaintiff has proved one or more of these contentions by a preponderance of the evidence, and that such acts or omissions on the part of defendant, if proved, constitute negligence, and were the proximate cause of plaintiff's injuries, then a verdict should be found for plaintiff.

The appellant has cited *Armit v. Loveland* (C.C.A. 3), 115 Fed. 2d 308 in support of his contentions. In that case there was admittedly oil splashed all over the floor of the engine room. The court merely held that the seaman did not assume the risk of this admittedly unsafe condition. In our case no unsafe condition was admitted, and in fact the evidence was very strong to show that none such existed. This case merely points out the correctness of the qualifying phrase used in the instruction "in the absence of negligence."

Appellant has also cited *Socony Vacuum Oil Co. v. Smith*, 305 U.S. 424, 59 S.Ct. 262, 83 L.ed. 265. In that case there was, once again, admittedly defective appliances which proximately caused the seaman's injury. The court held that there is no defense of assumption of risk where a seaman knowingly used an admittedly unsafe appliance. This is not pertinent to our case since there was conflicting evidence on whether or not the appliance used was unsafe.

The appellant has cited six cases in a list on page 10 of his brief, allegedly standing for the proposition that "There is no assumption of risk in cases like ours."*

**The Diamond Cement* (C.C.A. 9), 95 Fed. 2d 738. Court found a loose pipe lying on engine room floor was unseaworthy.

Menefee v. W. R. Chamberlin & Co. (C.C.A. 9), 176 Fed. 2d 828. Court found vessel unseaworthy because a hawser had not been stowed properly prior to sailing. Sailor injured while stowing.

Storgard v. France & Canada S. S. Corp. (C.C.A. 2), 263 Fed. 545. Vessel was unseaworthy because of a worn bolt which broke while being used by a seaman.

Phillips v. Matson Nav. Co. (D.C. Cal.), 62 F. Supp. 247. Seaman slipped in a pool of oil which had admittedly accumulated at the bottom of a ladder. Judge Goodman found negligence on the facts.

Beadle v. Spencer, 298 U.S. 124, 56 S. Ct. 712, 80 L.ed. 1082. A seaman was injured by falling off a pile of lumber which was determined to have been negligently stowed.

The Arizona v. Auelich, 298 U.S. 110, 56 S.Ct. 707, 80 L.Ed. 1075. Court reiterated that seamen assume ordinary risk, and approved *The Iroquois* (supra) and held that seamen do not assume risk of unseaworthiness.

In each of these six cases there was found to be an unseaworthy condition, or it was found that the accident resulted from negligence of the shipowner. These cases by their holdings emphasize that the seamen do assume the ordinary risk of their profession, but do not assume the risk of working with a defective appliance, nor do they assume the risk of negligence on the part of their employer. We have no argument with this holding. However, it is to be reiterated here, that the court in our case did not instruct the jury that the appellant assumed the risk of negligence, or unseaworthiness—the court instructed the jury only that *in the absence of negligence*, the appellant assumes the *ordinary risk* of his profession.

The appellant has also cited *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, pp. 64, 66, 63 S.Ct. 444, 87 L.Ed. 610. This is a case involving injury to a railroad employee. A careful reading of the case re-emphasizes that the legal doctrine commonly termed “assumption of risk”, means the assumption of the risk of negligence, or risk arising from use of a defective appliance, and this defense is admittedly abolished by the Jones Act.

It is suggested that plaintiff has confused the legal doctrine often described as “assumption of risk” with a completely different principle, merely because three of the same words appear in the context of each. That a seaman assumes the risk of negligence is no longer a defense. That a seaman assumes the *ordinary risk of his profession* is merely a declaration of a sound legal principle. The fact is that appellant’s counsel consented to the giving of this first sentence of the instruction, stating that he deemed it to be a “sufficient instruction” (R. 300, lines 7-8). The first sentence reads “You are instructed that the plaintiff, as

an employee in the absence of negligence on the part of his employer, assumed the ordinary risk of his employment as a seaman.”

B. UNAVOIDABLE ACCIDENT

The appellant has contended that the court prejudiced the appellant's case by giving an instruction on unavoidable accident. Such is not the case. The court gave an instruction on this because it is customary to do so in negligence cases. The reason is obvious. It is to point out to the jury that “even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution”, if it was not “proximately caused by negligence”, then no one may be held liable therefor. Obviously the jury could reach the conclusion that there was no negligence on the part of appellee that proximately caused the accident, but one or two jurors might still say “we agree—but it *did* happen”. The purpose of the instruction is to avoid the possibility that the jury might reach an erroneous verdict, merely because of the happening of an accident, after having found no negligence which was the proximate cause. It is submitted that the instruction was entirely proper, and in no way prejudicial to the appellant's case.

C. ALLEGED FORMULA INSTRUCTIONS

The appellant has argued that the court unduly emphasized “defense” instructions. He argues that instruction Nos. 7, 8, 11, 15 and 16 are repetitious. Such is not the case.

Instruction No. 7 (Cl. Tr. 46) instructs the jury that under the Jones Act, the plaintiff must prove negligence by the *preponderance of the evidence*.

Instruction No. 8 (Cl. Tr. p. 46) instructs the jury that there is *no presumption* of negligence because of the happening of an accident.

Instruction No. 11 (Cl. Tr. 48) defines negligence as the "doing of some act which a reasonably prudent person would not do, or the failure to do something a reasonably prudent person would do," and further defines "reasonably prudent person" by pointing out that "exceptional foresight" is not required. It concludes by stating that if the weight of the evidence is equal, then the verdict must be for the appellee. This is a necessary instruction to adequately define what is meant by "preponderance of the evidence".

Instruction No. 15 (Cl. Tr. 50) instructs the jury that the existence of a defective condition does not in itself establish negligence, but that it must also be shown that the condition was the *proximate cause* of the injury.

Instruction No. 16 (Cl. Tr. 51) instructs the jury that all of the above must be found because the *steamship company is not an insurer*. It defines the duty to exercise reasonable care.

Each of these instructions covers a separate and distinct element of actionable negligence, and each is necessary for the jury to obtain an adequate understanding of the problem put before them.

The two cases cited by appellant, allegedly supporting the proposition that these instructions were objectionable on the ground of repetition (Appellant's Brief, p. 15, *Chutuk v. Southern Counties Gas Co.*, 21 Cal. 2d 372 and *Snodgrass v. United States* (C.C.A. 9), 61 F.2d 99) merely held that refusal to give instructions already adequately covered by others was not error.

Appellant also argues that there were two instructions given on contributory negligence (Appellant's Brief, pp. 17 and 18). These instructions primarily advise the jury with reference to the rule of apportionment of damages. They could not have been prejudicial since the jury is presumed not to have reached the question, having found no negligence on the part of the appellees.

Appellant addresses a specific objection to Instruction No. 8, which reads as follows (Cl. Tr., p. 46) :

"No presumption of negligence is created by reason of mere happening of an accident. Unless you can determine from a preponderance of the evidence the manner in which the accident occurred and that it was proximately caused by negligence on the part of the defendant, it is your duty to find for the defendant on the issue of negligence."

No objection was made to this instruction at the time the instructions were discussed in Chambers (R. pp. 297-298). Consequently, the nature of the objection was never called to the attention of the court. The argument now presented is entirely without merit. Appellant objects because the court used the phrase "Unless you can determine from the preponderance of the evidence the manner in which the accident occurred and that it was proximately caused by the negligence on the part of the defendant * * *"—and asserts that there is no requirement that the jury determine "the manner in which the accident occurred."

We submit that in all cases it is necessary for the jury to be able to find the manner in which the accident occurred. *Franklin v. Skelly Oil Co.*, 141 Fed. 2d 568, 571 (10 Circ.); *Snow v. Harris*, 41 Cal. App. 34, but in this case the argument is entirely irrelevant. The manner in

which the accident occurred was admitted by all witnesses. The plaintiff fell off the ladder in No. 4 hold of the SS MARY OLSON. If the Appellant had been found at the bottom of the ladder, unconscious and without recollection of how he got there, then the jury would have to determine, either by reasonable inferences, or by direct evidence that he fell from the ladder, before reaching the question of negligence. In this case numerous witnesses saw the fall, so there was no question as to the manner in which the accident occurred, the question for the jury was the cause.

Obviously the jury determined the manner in which the accident occurred, because it was admitted, and the instruction merely stated that they must find that this fall was proximately caused by the negligence of the appellee before finding appellee liable. Admittedly the wording may have been surplusage, but it was merely introductory to the remainder of the instruction, and since there was no question as to the manner in which the accident occurred the instruction could not possibly have prejudiced the appellant.

The Court properly instructed the jury that if the fall was caused by either the bent ladder rungs, or by appellant's slipping on oil or grease, or by both, then a verdict must be for plaintiff (Cl. Tr. 29; R. 382) so the instruction stating that the jury must find the "manner" of the accident was fully explained and appellant's objection thereto was entirely negated.

Appellant further objects to Instruction 8 on the ground that it was a "formula instruction" which did not state all of the elements essential to the case of the party in whose behalf it was given.

For an instruction to be properly termed a formula instruction it must be one that is "intended to be a complete statement of the law upon which the jury may base a verdict". *Harvey v. Aceves*, 115 Cal. App. 333 at page 339; *Douglas v. Southern Pac. Co.*, 203 Cal. 390. It is obvious that this instruction was an instruction only upon one branch of the case and did not purport to be a complete statement of the law. It is therefore not a "formula instruction", nor would it be logical to assume that it was intended as such or accepted as such by the jury. *Harvey v. Aceves*, supra.

Appellant argues that Instruction No. 11 (Cl. Tr. 48) was also a formula instruction. The statement and cases cited in the paragraph immediately preceding are equally applicable in rejecting this contention.

D. INSTRUCTIONS NOT GIVEN

Appellant argues that the court erred in failing to give his requested instruction No. 3 (Appellant's Brief, p. 19). This instruction was given in its entirety (Cl. Tr. p. 48, R. 378). Appellant also argues that the court should have given his proposed Instruction No. 10 on contributory negligence. The context of that instruction was given twice, in slightly different words (Cl. Tr. 54-56, R. 363, 364).

In conclusion, the appellant urges that the court's charge, taken in its entirety, unduly emphasized the defense side of the case. The entire charge appears in the record commencing at page 373 and ending at page 391. It is respectfully suggested that a complete reading of the charge as a whole will give no such impression, and in fact if any emphasis is to be gained other than that of complete impartiality, the tendency appears to be in favor

of the appellant. Practically all of the appellant's proposed instructions with regard to damages were given, and ample instruction on the fact that contributory negligence, if proven, only serves to mitigate the damages, all of which could well be said to indicate a verdict in favor of the appellant.

The appellant states that because the Trial Judge stated after the verdict that he believed the jury had reached a "proper verdict" is evidence that the judge was prejudiced in favor of the appellee. This comment was made in conjunction with the court's compliments to the jury on the time and care they had used in reaching the verdict and was nothing more than an indication that the judge believed that the jury had thoroughly and properly considered the evidence (R. 401).

JURISDICTION OF THE MARITIME ISSUE OF "UNSEAWORTHINESS"

Appellant argues that the court erred in ruling that absent diversity of citizenship the Maritime causes of action for maintenance and unseaworthiness were exclusively within the admiralty jurisdiction of the court.

It should be sufficient to say that the appellant relies entirely upon the case of *Doucette v. Vincent*, 194 Fed. 2d 834, and that that case is simply not the law in this circuit. This court has already passed on the question in *Modine v. Matson*, 128 F. 2d 194 (C.A. 9, 1942). The most frequently cited case, and the case relied upon by the District Court is *Jordine v. Walling*, 185 F. 2d 662 (C.A. 3, 1952). In that case the rationale of the unsolicited opinion of Judge Magruder in *Doucette v. Vincent*, supra, was disapproved.

The District Courts of the United States have jurisdic-

tion of civil actions under the terms of Section 1331 and 1332 of Title 28, United States Code. Appellant in the case below alleged a cause of action for damages for personal injuries due to the alleged negligence of the defendant. That cause of action, which was the first, arose under the Jones Act and was within the civil jurisdiction. The second and third causes of action alleged in the complaint arose under the general maritime law. They are civil actions falling within Section 1332. Inasmuch as they do not arise under the constitution, laws or treaties of the United States, diversity of citizenship is a pre-requisite to the jurisdiction of the court. It was alleged and admitted by the pleadings that there was no diversity of citizenship (Cl. Tr. 2, and Cl. Tr. 10).

The jurisdiction of federal courts in cases involving claims of unseaworthiness is exactly the same as the jurisdiction over seamen's claims for maintenance. The overwhelming weight of authority is that those cases which fall in the admiralty jurisdiction of the court may be prosecuted on the law side only where there is diversity of citizenship, unless the action is maintained under a special statute such as the Jones Act. The question has been settled in this circuit by the decision of *Modine v. Matson Nav. Company*, 128 F. 2d 194 at page 196 wherein this Honorable Court stated:

“We conclude that Count 2 (maritime cause for maintenance) did not state a claim upon which the District Court, sitting as a law court, could grant relief. If the District Court could grant relief upon the claim * * * it could do so only in admiralty.”

The most authoritative text on the practice of Admiralty thoroughly agrees with *Modine v. Matson* (supra) and *Jor-*

dine v. Walling (supra). *Benedict on Admiralty*, 6th Ed., Vol. 4, page 200. In the supplement to Vol. 4, page 40, the author states:

“The common law side of the Federal District Court can not entertain a suit for maintenance and cure (citing *McDonald v. Cape Cod Trawling Corp.*, 1947 AMC 699, 71 F. Supp. 888 (D.C. Mass.) and others), or for indemnity for injuries under the general maritime law unless the jurisdictional minimum amount of \$3,000 can be shown, and unless diversity of citizenship exists. (Citing *Branic v. Wheeling Steel Corporation*, 1946 AMC 66, 152 F. (2d) 887 (C.A. 3d) certiorari denied (1946) 327 U.S. 801, 90 L. ed. 1026 and others).”

The same rule is applied in the 7th Circuit. *Mullen v. Fitz Simons and Connel Dredge and Dock Co.*, 191 F. 2nd 82 (C.A. 7, 1952), cert. denied 342 U.S. 888 and 344 U.S. 933.

Failure to meet the jurisdictional requirements has been the basis of rulings in several district courts. *McDonald v. Cape Cod Trawling Corporation*, 71 F. Supp. 888 (D.C. Mass. 1947). (Judge Wyzanski confessed in this case that district courts have frequently, but erroneously, allowed such cases to be tried on the law side.) *Catherall v. Cunard SS Co.*, 101 F. Supp. 230 (D.C., S.D.N.Y., 1951); *Watlack v. North Atlantic & Gulf SS Co.*, 107 F. Supp. 162 (D.C. Penn. 1952).

The same ruling was applied in a case involving a long-shoreman's action for negligence. *Ferris v. American South African Line, Inc.*, 1945 AMC 1296 (D.C. S.D.N.Y., 1945).

The ruling is otherwise in the First Circuit Court of Appeals. In *Doucette v. Vincent*, 194 F. 2nd 834 (1952),

that court disagreed with the cases upon which we rely, but the First Circuit stands alone on the question.

Appellant has argued that the Supreme Court passed on this question, and infers a decision favorable to his contentions from the result of *Pope & Talbot v. Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. ed. 143. This same argument was made to the District Court for the Eastern District of New York in *Paduano v. Yamashita Nisen Kabushiki Kaisha*, 120 F. Supp. 304 (decided March 31, 1954) and was rejected in a thorough and excellently reasoned opinion. In so doing the court drew attention to the footnote to the decision in *Pope & Talbot v. Hawn*, (supra) appearing at page 410 of the report in 346 U. S. Counsel for appellant has ignored the footnote in arguing that this case inferentially passes on the question and consequently the footnote is set out in full as follows:

“The complaint shows diversity which is sufficient to support jurisdiction of the District Court. The complaint also shows that the claim rests on a maritime tort which under the Constitution is subject to dominant control of the Federal Government. In this situation we need not decide whether the District Court’s jurisdiction can be rested on 28 U.S.C. § 1331 as arising ‘under the Constitution, laws or treaties of the United States.’ See *Doucette v. Vincent*, 194 F. 2d 834, and *Jansson v. Swedish American Line*, 185 F. 2d 212. Cf. *Jordine v. Walling*, 185 F. 2d 662.”

Appellant’s argument that the “impact of the decision would seem to leave it clear that jurisdiction can be founded on that provision (28 U.S.C. 1331)” (App. Brief p. 27) is thoroughly considered in the *Paduano* case supra, and is not accepted (see 120 F. Supp. at page 313.)

It is respectfully submitted that the great weight of authority supports the earlier decision of the court in *Modine v. Matson Nav. Co.* (supra) and there exists no reason to change the law as it now stands in this circuit. District Judge Westover correctly followed the law in this circuit and no error was committed in reserving the jurisdiction of the seaworthiness cause to the court, sitting in Admiralty.

Counsel for appellant complains that the District Court “quickly and without argument from counsel, followed the jury’s verdict” (App. Brief, p. 29). We feel obliged to call to this court’s attention that counsel for appellant had submitted the question to the court without further argument, prior to the jury’s verdict. At page 394 and 395 of the record, the following dialogue occurred:

“The Court: At the beginning of this trial I reserved any evidence you wished to introduce on the second and third causes of action.

Mr. Resner: On the third cause of action, I have no evidence because I concede we have no cause of action.

On the unseaworthiness count, I submit the case to the court on the record as made in court.

Mr. Harrison: So submitted, your Honor.

The Court: Then the only thing now is to wait patiently for the jury.

Mr. Resner: I assume so, your Honor.”

So it can be seen that evidence or argument on the point was invited by the court and counsel for appellant chose to submit the matter at that time. He should not now be heard to complain that he was not allowed to argue the point after the jury returned a verdict unfavorable to him.

CONCLUSION

It is respectfully submitted that the case presented nothing more than a question of fact for the jury to decide under the Jones Act, and a question of fact for the court to decide under the general maritime law. The verdict and judgment were amply supported by the evidence.

There was no error in the instructions nor was there error in reserving the maritime cause to the court sitting in Admiralty.

The judgment should be affirmed.

Dated: June 30th, 1955.

Respectfully submitted,

ALAN B. ALDWELL

J. STEWART HARRISON

BROBECK, PHLEGER & HARRISON

Counsel for Appellee

No. 14,613

United States Court of Appeals
For the Ninth Circuit

HOMER C. MILLS,

Appellant,

vs.

UNITED STATES OF AMERICA, ex rel.
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sion,

Appellee.

Appeal from the United States District Court
for the District of Nevada.

OPENING BRIEF OF APPELLANT.

HOMER C. MILLS,

Searchlight, Nevada,

Appellant in Propria Persona.

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AUG -1 1955

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Statement of pleadings and facts.....	1
Question of jurisdiction.....	6
Specification of errors	7
Points and authorities	7
Argument	7
Conclusion	11

Table of Authorities Cited

Cases	Pages
Jones v. United States, 298 U.S. 1, 80 L. Ed. 1015, 56 S. Ct. 654	7
N. Y., N. H. & H. Ry. Co. v. Interstate Commerce Commission, 200 U.S. 361, 50 L. Ed. 515, 26 S. Ct. Rep. 272....	7

Constitutions

Constitution of the United States:

Article I, Section 1.....	7
Article I, Section 8, Clause 18.....	7

Statutes

Securities Act of 1933:

Section 3, subdivision 11(b).....	5, 9, 10
Section 5a(1)	2
Section 20(b)	2, 5, 6, 8
Section 22(a)	2

Rules

Rules on Appeal, Rule 28(b).....	2
----------------------------------	---

No. 14,613

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HOMER C. MILLS,

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vs.

UNITED STATES OF AMERICA, ex rel.
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sion,

Appellee.

Appeal from the United States District Court
for the District of Nevada.

OPENING BRIEF OF APPELLANT.

STATEMENT OF PLEADINGS AND FACTS.

(Note.) For convenience the appellee will be referred to as the Commission.

Appellant was found guilty of four counts of criminal contempt involving an alleged violation of the provisions of an injunction issued by the District Court of the United States, for Nevada in civil case No. 1000 which record is before this Court as an exhibit. Imposing of sentence was suspended for three years and defendant was placed on probation. (Tr. 56-58.)

The injunction enjoined the Corporation defendant therein named and Homer C. Mills from selling or offering for sale through Interstate Commerce: "the common capital stock 10¢ par value of Defendant Searchlight Consolidated Mining & Milling Company, a Corporation, through the use or medium of a prospectus, or otherwise, unless or until a registration is in effect with the Securities and Exchange Commission as to such securities; provided, that this injunction shall not apply to such security or any transaction if exempted from the provisions of Section 5 of the Securities Act of 1933, as amended, 15 U.S.C.A. 77c". (Tr. 24-25.)

The complaint in civil case No. 1000 was very brief and charged the corporation defendant and appellant were engaged or were about to engage in acts and practices which constituted or would constitute violations of Section 5 (a) (1) of the Securities Act of 1933, as amended, 15 U.S.C. 77e (a) (1b) and further alleged that the action was pursuant to Section 20 (b) of the Act 15 U.S.C. 77t (b) and that the action arose under Section 22 (a) of the Securities Act of 1933, as amended, 15 U.S.C. 77v (a). It was further alleged that no registration statement with respect to such securities had been in effect with the Commission.

The prayer of the complaint was for injunctive relief, but it contained the following proviso:

"that the foregoing shall not apply to any security or securities transaction which is exempt

from the provisions of Section 5 of the Securities Act of 1933, as amended.” (Tr. 67-68.)

The defendants denied the material allegations of the complaint and set out the defense that since about May 24, 1951, the Corporation defendant had been and was acting pursuant to an exemption granted by the Commission for the sale of its securities under Section 3 Subdivision (11) (b), which answer was filed without prejudice to motions filed to dismiss. (Tr. 70-72.)

The motion to dismiss contained 14 separate grounds (Tr. 72-78) but was mainly based on the grounds that the Court had no jurisdiction to grant injunctive relief. (Tr. 78.)

The entire proceedings in civil action No. 1000 was heard on documentary evidence and stipulations as to certain facts. There was no dispute as to any facts in the record.

From the facts in the record, it was established that the Corporation defendant had in all respects complied with Section 3 (11) (b) of the Securities Act and that the Commission made no claim that the “letter of notification” was not properly filed or was deficient in any respect. (Tr. 74.)

The gist of the transaction was found to be outside of any issue made by the complaint and consisted of the Corporation defendant having mailed to its shareholders, about 400 in number, certain letters sent to all existing shareholders between May 24, 1951 and

November 15, 1951, soliciting additional investments by them, upon the belief that these were private transactions exempted under several provisions of the Securities Act and were not in the nature of a public offering and for that reason it had not filed with the Commission copies of such letters before use. The Corporation upon its attention being called to said matter, discontinued such practice and disclaimed any intention of ever sending out similar solicitating letters without first filing copies thereof with the Commission. (Tr. 78.)

The four counts upon which the trial Court found the defendant guilty of contempt grew out of the sale by defendant of shares of stock owned by him personally theretofore issued to him by the Corporation and standing on the books of the Company in his name and in each instance were transfers from him to the purchaser as shown by the following facts:

John Antich purchased from appellant December 11, 1952, 1000 shares of stock in Searchlight Consolidated Mining & Milling Co., belonging to appellant and paid \$100.00 therefor (Tr. 25-26) for which he received Certificate No. 1113 and on the transfer stubs of the Company stockbook there was contained the following notation—"H.C.M. \$100.00". (Tr. 46.)

Lena Sultana acquired Certificate No. 1119 for \$200.00 paid to appellant receiving 2000 shares transferred from appellant. (Tr. 47.)

Jack Zweigle and his order received Certificates Nos. 1138-39-40, totaling 4000 shares for which he

paid \$400.00 (Tr. 31-32) and these were shown to have been transferred from the holdings of appellant. (Tr. 48.) There were letters exchanged between Zweigle and appellant wherein the appellant stated to him "the Company is not interested in selling any more of its shares" and that the appellant would let him and his friends have some of his personally owned shares at 10¢ per share "which will carry the same rights as the Company shares". (Tr. 30.)

One O'Brien, an investigator for the Commission, filed his affidavit showing, among other things, the four matters complained of to-wit: Antich, Sultana, Zweigle, and Albany, (Tr. 44-48) and of the stock transactions shown on the stubs of the stockbook, all were transfers except Certificate 1108 for 2000 shares to the McKinleys, 1000 of which was Treasury stock. (Tr. 46.)

In the contempt hearing, the appellant filed his affidavit (Tr. 51-54) setting forth the facts of the stock transfers and also that the only Company stock issued subsequent to the injunction was 1000 shares to the McKinleys which they acquired personally at Searchlight, Nevada; further in the affidavit of the appellant, it is shown the company attempted to solicit further investments from its shareholders and filed with the Commission copies of the proposed letters but they were never used because of the objections of the Commission. The Corporation still maintains all times it had and still has a valid exemption under Section 3 (11) (b) of the acts in question.

This appeal is from the judgment in the contempt matter. (Tr. 58-59.)

QUESTION OF JURISDICTION.

1—The jurisdiction of the trial Court in the injunction action was conferred upon it by Section 20 of the Securities Act of 1933, as amended, Subdivision (b) wherein it is provided that whenever it appears to the Commission that any person engaging in or is about to engage in *any acts or practices* which will constitute a violation of the provisions of the act *or any rules or regulations prescribed under authority thereof*, the Commission may in its discretion bring an action in any District Court of the United States, “*to enjoin such acts or practices*” and upon a proper showing an injunction may be granted. This jurisdiction is created by statute and is limited to restraining a continuance of the *acts and practices complained of*. (Italics ours.)

2—This appeal raises the question of the jurisdiction of the trial Court in the contempt proceedings to render any judgment against appellant—because—

(a) the injunction in civil case No. 1000 was a nullity and of no force or effect;

(b) the undisputed facts before the Court in the contempt proceedings show that the appellant did not, in any manner, violate the injunction in question.

SPECIFICATION OF ERRORS.

1—That the trial Court erred in finding the appellant guilty of contempt of Court and in rendering judgment thereon because the evidence was insufficient to support the charges or any of them and that such findings were contrary to the evidence and the law.

POINTS AND AUTHORITIES.

1—The injunction issued in civil case No. 1000 was void because issued without jurisdiction and had the effect of removing the Corporation defendant from the protection of the law of the land.

N. Y. N. H. & H. R. R. Co. v. Interstate Commerce Commission, 200 U.S. 361, 50 L.ed. 515, 26 S.Ct. Rep. 272.

2—The Commission cannot enact laws in the guise of rules and regulations, as this power alone is vested in Congress.

Art. 1, Sec. 1 and Art. 1, Sec. 8, Clause 18,
Constitution of the United States;
Jones v. United States, 298 U.S. 1, 80 L.ed. 1015, 56 S.Ct. 654.

ARGUMENT.

Appellant does not consider a lengthy argument necessary on this appeal because the entire case is based on the charge that he used the mails to sell the

Common Capital stock of the Corporation defendant, whereas in truth and in fact, the evidence of the Government without dispute establishes no stock of the Corporation defendant was sold, and in those four instances where shares were sold, they belonged personally and wholly to the appellant, and the Corporation had no interest therein.

There is no law to prevent an owner of property from selling and conveying it to whom he pleases.

Through inadvertence the preliminary injunction obtained on April 3, 1952, restrained the Corporation and defendant Mills from using the mails to sell the Common Capital stock of the company, "or any other securities", but the trial Court in the contempt matter stated it was inadvertently placed therein and should not have been included and that he was disregarding it. (Tr. 121.)

A bare reading of Section 20 of the Securities Act of 1933, as amended, Subdivision (b) discloses that whatever jurisdiction the trial Court had in civil action No. 1000 was created by statute, and the statute limited the jurisdiction of the Court to the issue as to whether a given defendant was engaging in or was about to engage in any acts or practices which would constitute a violation of the Act, or any rules or regulations prescribed under authority thereof. The trial Court had no jurisdiction whatever to go beyond the limits of this statute.

Again, the defendants in civil action No. 1000 were brought into Court on the unfounded and misleading

charge of having acted without a registration statement in effect when the Commission well knew and the facts readily disclosed that the Corporation defendant did not need a registration statement in effect, but had a valid, existing and binding qualification and permit and was selling exempted securities issued and authorized under Section 3, Subdivision (11) (b) of the Act in question, consisting of an authorization allowed and granted by the Commission in the amount of \$300,000.00, authorized by its rules and regulations, which the Corporation defendant complied with in all respects.

Congress in qualifying securities by use of registration statements and those qualified as exempted securities did not discriminate in favor of one as against the other and each has equal standing and dignity under the law and before the Courts.

The actual facts in civil case No. 1000 disclose the normal situation of the Corporation defendant sending to four hundred of its shareholders two certain circular letters soliciting additional funds under the belief that it was not necessary to file copies of these with the Commission, because they were believed to be exempted securities under the statute. There was no issue in the pleadings with reference to these facts, but the Court found that by reason of having sent these communications the Corporation defendant and appellant herein should be forever restrained from all future efforts to sell exempted securities.

Since when can private litigants be brought into a Court of Justice and be charged with and found

guilty of a state of facts not in existence as shown by the complaint and a permanent injunction issued when no charges have been made as to the real facts, and they have never been given an opportunity to defend such charge?

When the true facts were developed in civil action No. 1000 the proceedings should have been dismissed.

The Corporation defendant stated in the injunction proceedings that in the future it had no objection to filing with the Commission copies of its proposed letters to its shareholders and this was all the Corporation was obligated to do. There is no provision in the Securities Act of 1933, as amended, to authorize a suspension or termination of a permit to proceed to market securities when once issued, and at the time the two circular letters were sent there was nothing in the rules or regulations of the Commission providing that it could suspend or terminate a permit.

Since this action arose and was tried in civil action No. 1000 the Commission has attempted to legislate, in detail, provisions for denial and suspension of any exemptions provided for by it under Section 3, Subdivision (11) (b) of the Act, (see rule 223 effective February 1, 1954 by the Commission).

It is clear that Congress alone can enact laws, and that Congress could not and did not delegate to the Commission authority to legislate in any manner or to any extent. (See Points and Authorities.)

Under the provisions of Subdivision (11) (b), Section 3 of the Act dealing with exempted securities,

we assume that the Commission did its duty when it received a notification of the Corporation defendant shown in civil case No. 1000, and that it found as a fact that the enforcement of the title of the Securities Act of 1933, as amended, with respect to the securities proposed to be offered by the Corporation defendant was not "necessary in the public interests and for the protection of the investors by reason of the small amount involved or the limited character of the public offering" and the amount did not exceed \$300,000.00. With this finding, the Corporation defendant secured a valid permit to market exempted securities, and there was no manner in which this right could be taken away from it, and this must be conceded because the Commission thereafter sought to authorize it to suspend such permits but if legal this would be retroactive as to the Corporation defendant, and could not be applied to its permit.

CONCLUSION.

In concluding this brief, the appellant submits that this appeal is well taken and the charges should be reversed and dismissed because the trial Court in the first instance had no jurisdiction to grant the injunction and it was absolutely void and a complete nullity and further the acts complained of by the Government and found true as to alleged contempts in this

matter were in no manner prohibited by the injunction.

Dated, Searchlight, Nevada,
August 1, 1955.

Respectfully submitted,
HOMER C. MILLS,
*Appellant in Propria
Persona.*

No. 14,613

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOMER C. MILLS,

Appellant,

vs.

UNITED STATES OF AMERICA, *ex rel.* SECURITIES AND
EXCHANGE COMMISSION,

Appellee.

BRIEF FOR APPELLEE.

SECURITIES AND EXCHANGE COMMISSION,

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SUBJECT INDEX

	PAGE
Statement	1
Argument	3
I.	
The decree of injunction is not subject to collateral attack in this action	3
II.	
Appellant's sales of securities were not exempt from the regis- tration provisions of the Act.....	3
Conclusion	6

TABLE OF AUTHORITIES CITED

CASES

PAGE

Edwards v. United States, 321 U. S. 473.....	5
Gompers v. Buck Stove & R. Co., 221 U. S. 418.....	3
Howat v. Kansas, 258 U. S. 181	3
United States v. Seidman, 154 F. 2d 228.....	3
United States v. United Mine, 330 U. S. 258.....	3

STATUTES

Securities Act of 1933, Sec. 2(11), 15 U. S. C. 77(b) (11).....	6
Securities Act of 1933, Sec. 3(b), 15 U. S. C. 77c(b).....	4
Securities Act of 1933, Sec. 5(a) (1), 15 U. S. C. 77e(a) (1)....	2

No. 14,613
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HOMER C. MILLS,

Appellant,

vs.

UNITED STATES OF AMERICA, *ex rel.* SECURITIES AND
EXCHANGE COMMISSION,

Appellee.

BRIEF FOR APPELLEE.

Statement.

This is an appeal from a judgment of criminal contempt entered against appellant for violation of a preliminary injunction issued by the United States District Court for the District of Nevada on April 3, 1952 [R. 13]. A final injunction was subsequently entered on June 30, 1953 [R. 23]. The defendant was placed on probation for three years.

The injunction resulted from a complaint filed by the Securities and Exchange Commission ("Commission") alleging that the appellant and the Searchlight Consolidated Mining & Milling Company ("Company") were

engaging in the sale of securities of the Company without registration in violation of Section 5(a)(1) of the Securities Act of 1933. The court filed its Findings of Fact and Conclusion of Law [R. 81-85] at the time of entering its preliminary injunction, and filed an opinion [R. 15-23] on March 17, 1953.

The preliminary injunction enjoined the defendants from making use of the mails or instruments of interstate commerce to sell the capital stock of the Company unless a registration as to such securities was in effect with the Commission with a proviso that it should not apply to any security or transaction which was exempt from registration. No appeal was taken.

Subsequent to the entry of the injunction, appellant continued to make a public offering of the stock.¹ He offered it to various persons and suggested that they offer it to others [R. 32, 34], offered a 20% commission to assist in disposing of it [R. 32, 34], and sometimes disposed of it through an intermediary [R. 43-44]. In addition to direct solicitation, newspaper advertisements were used [R. 111]. The mails were used [R. 26, 27-28, 30-40, 111], no registration was in effect [R. 151], and numerous sales were made [R. 44-50]. Appellant's brief does not dispute the facts nor did he dispute them in the court below [R. 102].

After a hearing the court below entered a judgment of criminal contempt from which this appeal was taken [R. 56].

¹See affidavits [R. 25-44]. Appellant has admitted the truth of the facts stated therein [R. 102-104, 126]. See also testimony [R. 105-112].

ARGUMENT.

I.

The Decree of Injunction Is Not Subject to Collateral Attack in This Action.

As may readily be seen from the careful opinion of the district judge [R. 15-23], the facts amply sustain the validity of the injunctive decree. However, even if that were not so, it has long been settled that the injunctive decree is not subject to attack and cannot be relitigated in this action. "The propriety of an injunction can never be tested by an appeal from a subsequent judgment in contempt." *United States v. Seidmon*, 154 F. 2d 228 (C. A. 7, 1946). Assuming, *arguendo*, that a court in issuing an injunctive decree is in error, yet "until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." *Howat v. Kansas*, 258 U. S. 181, 189-190 (1922). See also *Gompers v. Bucks Stove and Range Co.*, 221 U. S. 418, 450 (1911). This is so "without regard even for the constitutionality of the act under which the order is issued." *United States v. United Mine Workers*, 330 U. S. 258, 293 (1947).

II.

Appellant's Sales of Securities Were Not Exempt From the Registration Provisions of the Act.

To use appellant's words [R. 123], "the gist of this whole case completely" is his erroneous claim that his sales of securities were exempt from the registration provisions of the Act and therefore did not violate the injunction. We believe it is important to observe that these identical

contentions were made when the injunction was issued and that the court below painstakingly pointed out the error in appellant's argument in its opinion [R. 15-23] and in Finding No. 5 of its Findings of Fact [R. 83]. Appellant's continued sales to the public and his reiteration of these same invalid arguments cannot, therefore, be dismissed lightly as an inadvertent or innocent mistake.

Section 3(b)² of the Securities Act of 1933, 15 U. S. C., Sec. 77c(b), provides as follows:

“The Commission may from time to time by its rules and regulations, and *subject to such terms and conditions as may be prescribed therein*, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds \$300,000.” (Emphasis supplied.)

The Commission, pursuant to the statute, has adopted Regulation A which provides an exemption for certain classes of securities *under certain terms and conditions*.³ One of these conditions, which appellant failed to perform, is the requirement that three copies of the soliciting ma-

²Incorrectly referred to in appellant's brief as Section 3(11)(b). The court below was similarly misled.

³We are at a loss to understand Point 2 of appellant's brief, page 7. If, contrary to the statute, the Commission could not enact rules and regulations, then no exemption would exist under Section 3(b) at all. But it is on this exemption that appellant attempts to rely.

terial be filed with the Commission five days prior to its use. The court below correctly found [R. 83-84] "that the offer of sale . . . was not made in accordance with the terms and conditions of any exemption from registration, and no such exemption was available * * *"

Nevertheless, appellant continues to speak as if the securities were still exempt. It is important for the Court to recognize that there has been no Regulation A filing other than that which the court below, in the injunction proceeding, held appellant had nullified by his failure to file subsequent soliciting material. Accordingly, appellant's repeated references to "permits," and "suspension" and "termination" of such permits are misleading.⁴

The injunction enjoins both the Company *and* appellant from illegally selling Searchlight stock. Appellant attempts to distinguish between the Searchlight stock owned by the Company and the Searchlight stock owned by him, and claims that there was no restriction on the sale of his personally owned block of stock. But the injunction was not so limited and was properly not so limited.⁵ Congress was as much concerned with secondary distributions by controlling persons as with the primary distribution by

⁴We do not know if appellant, by his generalized specification of errors, intends to press the point that the Commission was obliged to negative every possible statutory exemption [R. 133]. It is clear that even in criminal cases the burden of proving an exemption is on the defendant. *Edwards v. United States*, 321 U. S. 473 (1941).

⁵Particularly in promotions dominated by single individuals, it cannot always be easily ascertained whether stock being sold is that owned by the company or by the promoter. The company's books [R. 46-49] showing the numerous certificates unaccounted for subsequent to the injunction illustrate the difficulties in this regard. That appellant did sell some of the company owned stock [R. 54] as well as his personal holdings is admitted, although he claims that the mails were not used in such transaction.

the corporation. See last sentence of Section 2(11) of the Act, 15 U. S. C., Sec. 77b(11).⁶

Appellant's attempts to becloud the issues are inadequate to conceal the simple facts; that he made sales to the public of securities that were not registered, and that no exemption was available—all in wilful violation of the court's decree.

Conclusion.

The judgment should be affirmed.

Respectfully submitted,

SECURITIES AND EXCHANGE COMMISSION,
By WILLIAM H. TIMBERS,
General Counsel,

DAVID FERBER,
Special Counsel,

ELLWOOD L. ENGLANDER,
Attorney,

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FRANKLIN RITTENHOUSE,
United States Attorney,

⁶For a statement of the Congressional purpose in enacting Section 2(11) see Report of Committee on Interstate and Foreign Commerce, 73rd Cong., 1st Sess., H. R., Report No. 85, pages 13-14. It was there pointed out that when individuals who own a substantial amount of the outstanding stock of a corporation seek to make a public offering thereof, such offering "may possess all the dangers attendant upon a new offering of securities" and such distributor is therefore "treated as equivalent to the original issuer" and "becomes subject to the act."

No. 14,613

United States Court of Appeals
For the Ninth Circuit

HOMER C. MILLS,

Appellant,

vs.

UNITED STATES OF AMERICA, ex rel. Securities and Exchange Commission,

Appellee.

Appeal from the United States District Court
for the District of Nevada.

REPLY BRIEF OF APPELLANT.

HOMER C. MILLS,

Searchlight, Nevada,

Appellant in Propria Persona.

FILED

SEP 28 1955

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Argument	1
No fairness or equity in position of Commission.....	5
Conclusion	8

Table of Authorities Cited

Cases	Pages
Ex parte Fisk, 113 U.S. 713.....	2
Ex parte Rowland, 104 U.S. 604.....	2
In re Ayres, 123 U.S. 443.....	2
In re Sawyer, 124 U.S. 200.....	2
Jones v. United States, 298 U.S. 1, 80 L. Ed. 1015, 56 S. Ct. 654.....	6

Constitutions

Constitution of the United States:	
Article I, Section 1.....	4
Article I, Section 8, Clause 18.....	4

Statutes

Securities Act of 1933, as amended.....	3, 4, 5
Securities Act, Section 3(b).....	5

No. 14,613

**United States Court of Appeals
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HOMER C. MILLS,

Appellant,

VS.

UNITED STATES OF AMERICA, ex rel. Se-
curities and Exchange Commission,

Appellee.

**Appeal from the United States District Court
for the District of Nevada.**

REPLY BRIEF OF APPELLANT.

ARGUMENT.

The first point made by counsel for the Commission is that the decree of injunction issued by the trial Court in civil case No. 1000 is not subject to attack in the present proceeding, citing a number of cases to support the statement.

The position of the appellant is:—that the injunction issued by the trial Court in civil case No. 1000 was a nullity because the Court had no jurisdiction to issue it, as set forth in our opening brief on pages Nos. 6 and 7.

The correct rule is that orders made by a Court having no jurisdiction to make them may be disregarded without liability to process for contempt.

In re Sawyer, 124 U.S. 200;

In re Ayres, 123 U.S. 443;

Ex parte Fisk, 113 U.S. 713;

Ex parte Rowland, 104 U.S. 604.

As was stated in *In re Fisk*, supra:

“When, however, a Court of the United States undertakes to punish a man for refusing to comply with an order which that Court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for contempt is equally void * * *”

As stated in our opening brief, the only jurisdiction the trial Court had in civil case No. 1000, was to enjoin the acts and practices complained of in the complaint, namely, the sending out of further circular letters by the company soliciting funds, without first filing such proposed letters with the Commission. (Opening Brief, p. 6.)

The Court exceeded its jurisdiction in going beyond the terms of the statutes above mentioned, and forever restrained the company from proceeding further under Regulation A.

On page 5 of their brief counsel for the Commission state:

“* * * It is important to the Court to recognize that there has been no Regulation A filing other than that which the Court below, in the injunction proceedings, *held Appellant had nulli-*

*fied by his failure to file subsequent soliciting material * * **” (Italics ours.)

Appellant is frank to say that finally the Commission has been forced to take the stand, which it did not do in any of the injunctive proceedings or in the contempt proceedings and for the first time contends that our exemption under Regulation A had been *nullified* by the failure of the company to first file soliciting material, before use of the material sent out by Searchlight Consolidated. (Italics ours.)

Nowhere in the Securities Act of 1933, as amended, is there any authority providing for a forfeiture or a nullification of an operator's right under Regulation A after it had been complied with. At that time there was no rule of the Commission providing for a forfeiture, nullification or suspension and nowhere in the decree of the trial Court in civil case No. 1000, or in its opinion, or in the contempt proceedings was a hint or finding ever made by the trial Court that Searchlight Consolidated Mining & Milling Co., had had its rights forfeited or nullified.

Counsel on page 5 of the brief of the Commission quotes from a portion of the opinion of the trial Court in support of this contention, wherein the Court found that the offer for sale * * * was not made in accordance with the terms and conditions of any exemption from registration and no such exemption was available. (Appellee's Brief, top page 5.)

The question of jurisdiction can be raised at any time. This is so elementary that citation of authority is unnecessary.

On page 11, the appellant, in his brief, in stating the procedure required by the Commission upon receipt of a letter of notification as shown in civil case No. 3, that the Commission:

“* * * found as a fact that the enforcement of the title of the Securities Act of 1933, as amended, with respect to the securities proposed to be offered by the Corporation defendant was not ‘necessary in the public interests and for the protection of the investors by reason of the small amount involved or the limited character of the public offering’ and the amount did not exceed \$300,000.00. With this finding, the Corporation defendant secured a valid permit to market exempted securities, and there was no manner in which this right could be taken away from it, and this must be conceded because the Commission thereafter sought to authorize it to suspend such permits, but if legal this would be retroactive as to the Corporation defendant, and could not be applied to its permit.”

For the first time, on February 1, 1954, the Commission published a new rule (223) providing for suspending of a Regulation A filing, and outlined many causes for such alleged authority, and set up an elaborate procedure seeking to create for itself rights and authority, never authorized by Congress and never intended by the Securities Act of 1933, as amended. The adoption of this rule was absolutely void as being contrary of Art. I, Sec. 1 and Art. I, Sec. 8, clause 18, Constitution of the United States. This is the basis for paragraph 2 of our points and authorities cited on page 7 of our opening brief.

NO FAIRNESS OR EQUITY IN POSITION OF COMMISSION.

A bare recital of the essential facts in this case could not show a more flagrant violation of the rights and property of an individual and a corporation, as shown by the Commission in civil case No. 1000 and the subsequent contempt case.

We find from the file of civil case No. 1000 that prior to May 24, 1951, the corporation defendant had, in all respects, complied with Section 3 (b) of the Securities Act and thus had secured an unqualified right to market its securities in any legal manner it saw fit by use of the mails and other means of Interstate Commerce, but thereafter such corporation sent only to its shareholders—about 400 in number—certain letters soliciting additional investments, without first having filed with the Commission copies thereof as required by its rules, at most a mere inadvertence and technical infraction of the Commission rule.

Without any warning whatever, and with no suggestions from the Commission, that such transactions were not permitted, the Commission went to the United States District Court at Las Vegas, Nevada, and secured a temporary injunction,—not to restrain the corporation defendant from further acts and practices of a like or similar nature, but to forever bar the corporation from thereafter marketing any of its securities under Regulation A, a proceeding wholly unauthorized by the Securities Act of 1933.

Now for the first time, the Commission contends our right to comply with the rules and thereafter marketing its securities has been *nullified* and *for-*

feited because of the conduct in sending out the letters above mentioned. The trial Court could not and did not create a new law, it had only jurisdiction to restrain further violations of the acts complained of or any future acts of a like or similar nature.

The Commission was created by Congress not only to aid investors but also to aid those companies or parties financing under its provisions and its rules and regulations. Here we have an arbitrary example of what the Commission can do and is doing to destroy the operations of a company who is seeking venture capital. The company, as shown by the record, has at all times been willing to comply with any rules or regulations of the Commission, but the injunction as sought by the Commission and secured in civil case No. 1000, as construed by the Court in the contempt proceedings, and the Commission absolutely destroyed the rights of the company to proceed, all without authority of law and without any process whatever.

In our opening brief, page 7, we cited *Jones v. United States*, 298 U.S. 1, 80 L. Ed. 1015, 56 S. Ct. 654. The *Jones* case is important because it shows that the Commission cannot legislate in violation of the Federal Constitution; neither can it act in an arbitrary, capricious or unlawful manner, even though they have adopted a rule giving it such color of right.

Appellant thinks the following quotation is decisive of the issues in this case taken from *Jones v. United States*, *supra*.

“* * * The act contains no provision upon the subject * * * We are unable to find any precedent for the assumption of such power on the part of an administrative body, and we go to the practice and rules of the Court in order to determine by analogy the scope and limit of the power; for at least in the absence of a statute to the contrary, the power of the Commission to refuse to dismiss a proceeding on motion of the one who instituted it cannot be greater than the power which may be exercised by the judicial tribunals of the land under similar circumstances * * * (18-19)

“* * * The action of the Commission finds no support in right, principle or in law. It is wholly unreasonable and arbitrary * * * (23)

“* * * Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Justice Day—‘there is no place in our Constitutional system for the exercise of arbitrary power’, *Garfield v. Goldsby*, 211 U.S. 249-262. To escape assumption of such power on the part of the primary departments of the Government is not enough. Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well, and if the various administrative bureaus and Commissions necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend the powers by encroachment—even petty encroachments—upon fundamental rights, privileges and immunities of the people, we shall in

the end, while avoiding fatal consequences of a supreme autocracy, be submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of the Constitutional guarantees.”

CONCLUSION.

The judgment of contempt cannot be sustained, because—

1. The trial Court had no jurisdiction in civil case No. 1000 to issue any injunction except to enjoin the acts and practices complained of, and the acts of the Court in going beyond this statute were absolutely null and void.

2. The trial Court having had no jurisdiction to make the order in the injunction matter to the extent which it did, any interested party can disregard such orders without liability of process or contempt.

3. Even if the acts complained of in the contempt matter were found to be within the prohibitive terms of the injunction, yet the undisputed facts in the contempt proceedings show that the appellant was not guilty of any of the acts charged.

4. Any facts in support of contempt proceedings must be proven beyond a reasonable doubt, and no such proof exists in the contempt proceedings, but on the contrary the facts absolve the appellant in all respects.

We submit the judgment and order should be reversed and the proceedings dismissed.

Dated, Searchlight, Nevada,
September 28, 1955.

HOMER C. MILLS,
Appellant in Propria Persona.

No. 14617

United States
Court of Appeals
for the Ninth Circuit

UP-RIGHT, INC., a corporation, and WALLACE
J. S. JOHNSON, Appellants,

vs.

PATENT SCAFFOLDING CO., INC., a corpora-
tion, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

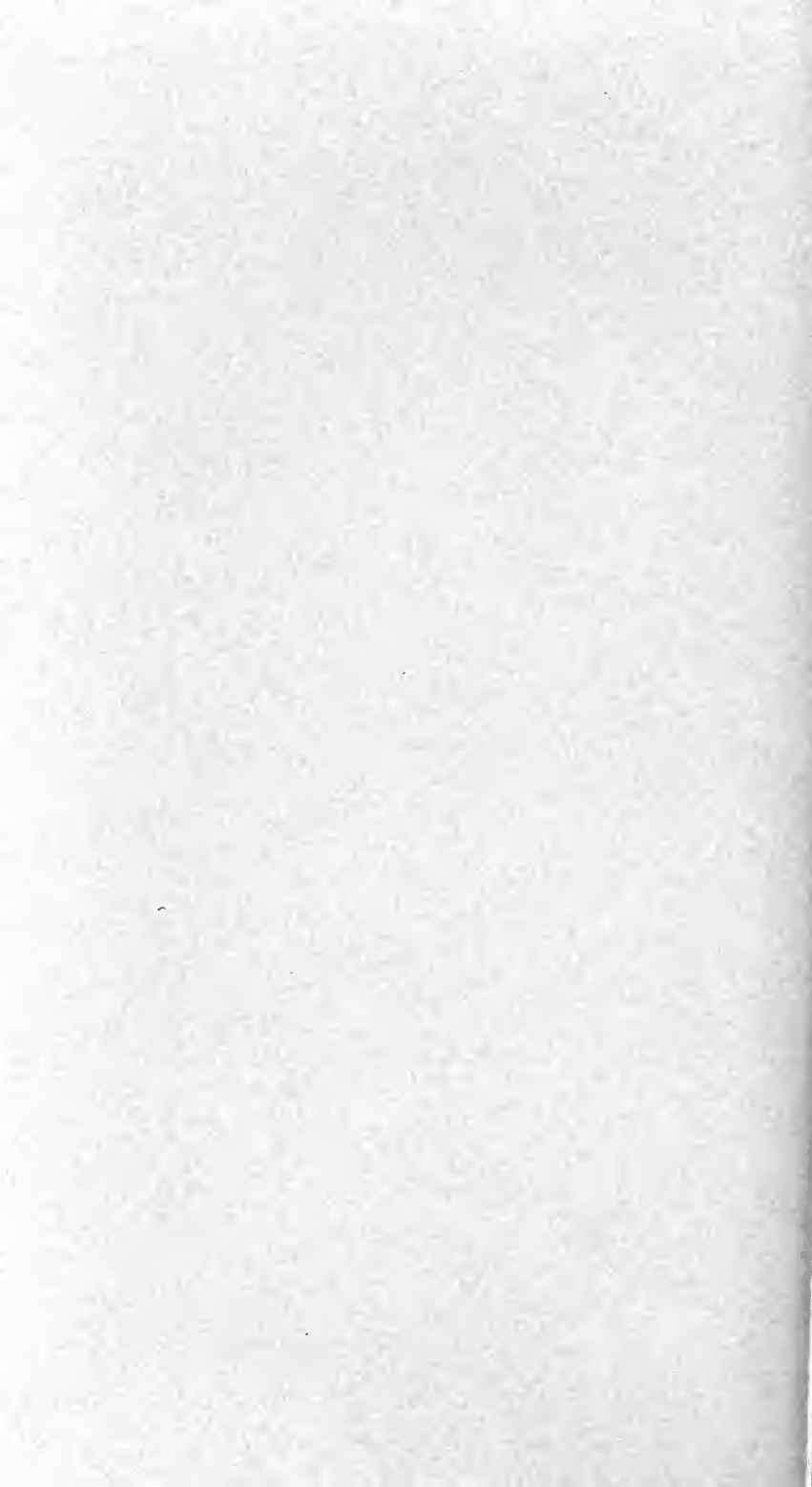
(Pages 1 to 229, inclusive.)

Appeal from the United States District Court for the Northern
District of California, Southern Division

FILED

APR 11 1955

PAUL P. O'BRIEN, CLERK



No. 14617

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Court of Appeals
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UP-RIGHT, INC., a corporation, and WALLACE
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Complaint	6
Answer to Amended Complaint.....	9
Appeal:	
Bond for Costs on.....	24
Certificate of Clerk to Transcript of Record	
on	25
Notice of	23
Statement of Points on (USCA).....	228
Stipulation re Book of Exhibits on (USCA)	229
Bond for Costs on Appeal.....	24
Certificate of Clerk to Transcript of Record..	25
Complaint	3
Decision, Memorandum	13
Findings of Fact and Conclusions of Law.....	14
Judgment	22
Names and Addresses of Attorneys.....	1
Notice of Appeal	23
Statement of Points to be Relied Upon (USCA)	228

Stipulation re Book of Exhibits (USCA).....	229
Transcript of Proceedings and Testimony.....	27
Exhibits for Plaintiffs:	
1—Letters Patent No. 2,618,496, Wallace J. S. Johnson	231
Admitted in Evidence	31
4—Prior Art Patents	235
J. A. Brill No. 376,810.....	236
W. H. Willson & S. Conover No. 411,- 481	238
L. J. Finkle No. 1,197,727.....	240
J. A. Luarde No. 1,886,112.....	244
F. V. Fogelstrom No. 1,973,948.....	247
R. A. Uecker No. 2,043,498.....	250
O. S. Burman No. 2,256,892.....	255
P. Kotler No. 2,327,050.....	258
W. T. Prowd No. 2,388,179.....	260
Alfred Pumphrey No. 976.....	264
Admitted in Evidence	33
5—Letters Patent No. 2,438,173, W. J. S. Johnson, et al.	267
Admitted in Evidence	35
13—Advertisement in American Painter and Decorator Magazine for April, 1951.....	273
Admitted in Evidence	62
14—Brochure entitled “Up-Right Scaffolds” 1947-53	274
Admitted in Evidence	63
15—Tear Sheets of Ad of Defendant’s Device 1950	280
Admitted in Evidence	65

Transcript of Proceedings—(Continued)

Exhibits for Plaintiffs—(Continued)

16—Brochure of Defendant's Scaffold 1950..	282
Admitted in Evidence	66
17—Brochure of Patent Scaffolding Co. No.	
ASF-1, 1952	287
Admitted in Evidence	66

Exhibits for Defendant:

D—J. M. Athans Patent No. 1,679,017.....	292
Admitted in Evidence	104
E—R. A. Uecker et al Patent No. 2,203,114.	301
Admitted in Evidence	104
F—G. A. Countryman Patent No. 1,912,475..	305
Admitted in Evidence	105
G—M. Taylor Patent No. 747,270.....	315
Admitted in Evidence	105
H—J. Burns Patent No. 1,181,734.....	319
Admitted in Evidence	105
I—J. Stevens & O. D. Warfield Patent No.	
351,474	324
Admitted in Evidence	105
J—G. A. Hinckley Patent No. 135,988.....	328
Admitted in Evidence	105
K—J. S. Birch Patent No. 210,235.....	331
Admitted in Evidence	106
L—E. Michelin Patent No. 750,675.....	334
Admitted in Evidence	106
M—C. T. Mapes Patent No. 854,512.....	339
Admitted in Evidence	106
N—F. Moore Patent No. 2,184,358.....	343
Admitted in Evidence	106

Transcript of Proceedings—(Continued)

Witnesses:

Johnson, Wallace J. S.

—direct	28
—cross	69
—redirect	90, 98
—recross	95
—rebuttal, direct	191
—cross	196

Meng, Victor W.

—direct (for Plaintiff)	101
—direct (for Defendant)	177
—cross	189

White, George B.

—direct	107, 111
—voir dire	109
—recalled, direct	139
—cross	155

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In the United States District Court, Northern District of California, Southern Division

Civil Action No. 32212

UP-RIGHT, INC., a corporation, and WALLACE
J. S. JOHNSON, an individual,
Plaintiffs,

vs.

THE PATENT SCAFFOLDING CO., INC., a
corporation, Defendant.

COMPLAINT

Come Now Up-Right, Inc., and Wallace J. S. Johnson, plaintiffs above named, and for cause of action against the defendant The Patent Scaffolding Co., Inc., allege:

I.

That plaintiff, Up-Right, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has a place of business in Berkeley, County of Alameda, State of California.

II.

That plaintiff Wallace J. S. Johnson is a citizen of the United States of America and a resident of Berkeley, County of Alameda, State of California.

III.

That plaintiffs are informed and believe and on information and belief allege that the defendant, The Patent Scaffolding Co., Inc., is a corporation of the State of New York, and has a regular and

established place of business in the City and County of San Francisco, State of California, and has designated an agent in the State of California upon whom process may be served in conformity with the laws of the State of California.

IV.

That this Court has jurisdiction of this cause because the same arises under the patent laws of the United States.

V.

That Letters Patent of the United States of America No. 2,618,496 were duly and regularly issued all in accordance with law and plaintiff, Wallace J. S. Johnson is the owner of all of the entire right, title and interest in and to and under said Letters Patent No. 2,618,496 and plaintiff Up-Right, Inc., by virtue of an agreement in writing became the exclusive licensee to make, sell and use the invention of said Letters Patent No. 2,618,496.

VI.

That plaintiffs are informed and believe and on information and belief allege that the defendant The Patent Scaffolding Co., Inc., has, within six years last past and prior to the filing of this complaint, and within the Northern District of California, Southern Division, infringed said Letters Patent No. 2,618,496.

VII.

That plaintiffs are informed and believe and on information and belief allege that defendant has

committed the aforesaid acts of infringement in knowing, wanton and deliberate disregard of the rights of plaintiffs in the premises.

VIII.

That plaintiffs have been damaged by the infringing acts of defendant in an amount unknown to plaintiffs, but plaintiffs are informed and believe and on information and belief allege that said damage is in excess of Three Thousand Dollars (\$3,000.00).

Wherefore Plaintiffs Pray:

1. For damages from the defendant in the amount of five per cent (5%) of the sales price of each device manufactured and sold by defendant that is an infringement of said Letters Patent No. 2,618,496.

2. That plaintiffs have judgment against the defendant for reasonable attorneys' fees incurred by plaintiffs in this action.

3. That plaintiffs have judgment against the defendant for their costs and disbursements herein, and for such other and different relief as this Court may deem meet and proper in the premises.

UP-RIGHT, INC. (a corporation)

WALLACE J. S. JOHNSON,

/s/ By JACK E. HURSH,

One of counsel for Plaintiffs.

[Endorsed]: Filed December 12, 1952.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Come Now Up-Right, Inc., and Wallace J. S. Johnson, plaintiffs above named, and for cause of action against the defendant, The Patent Scaffolding Co., Inc., alleged:

I.

That plaintiff, Up-Right, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, and has a place of business in Berkeley, County of Alameda, State of California.

II.

That plaintiff, Wallace J. S. Johnson, is a citizen of the United States of America and a resident of Berkeley, County of Alameda, State of California.

III.

That plaintiffs are informed and believe, and on information and belief allege, that the defendant, The Patent Scaffolding Co., Inc., is a corporation of the State of New York, and has a regular and established place of business in the City and County of San Francisco, State of California, and has designated an agent in the State of California upon whom process may be served in conformity with the laws of the State of California.

IV.

That this Court has jurisdiction of this cause

because the same arises under the patent laws of the United States.

V.

That Letters Patent of the United States of America No. 2,618,496 were duly and regularly issued all in accordance with law and plaintiff, Wallace J. S. Johnson, is the owner of all of the entire right, title and interest in and to and under said Letters Patent No. 2,618,496 and plaintiff, Up-Right, Inc., by virtue of an agreement in writing, became the exclusive licensee to make, sell and use the invention of said Letters Patent No. 2,618,496.

VI.

That plaintiffs are informed and believe, and on information and belief allege, that the defendant, The Patent Scaffolding Co., Inc., has, within six (6) years last past and prior to the filing of this complaint, and within the Northern District of California, Southern Division, infringed said Letters Patent No. 2,618,496.

VII.

That plaintiffs are informed and believe, and on information and belief allege, that defendant has committed the aforesaid acts of infringement in knowing, wanton and deliberate disregard of the rights of plaintiffs in the premises.

VIII.

Plaintiffs have placed the required statutory notice on articles manufactured and sold under said

Letters Patent, and have given written notice to defendant of said infringement.

IX.

That plaintiffs have been damaged by the infringing acts of defendant in an amount unknown to plaintiffs, but plaintiffs are informed and believe, and on information and belief allege, that said damage is in excess of Three Thousand Dollars (\$3,000.00).

Wherefore Plaintiffs Pray:

1. For damages from the defendant in the amount of Five Per Cent (5%) of the sales price of each device manufactured and sold by defendant that is an infringement of said Letters Patent No. 2,618,496.

2. That plaintiffs have judgment against the defendant for reasonable attorneys' fees incurred by plaintiffs in this action.

3. That plaintiffs have judgment against the defendant for their costs and disbursements herein, and for such other and different relief as this Court may deem meet and proper in the premises.

UP-RIGHT, INC. (a corporation)

WALLACE J. S. JOHNSON,

/s/ By OSCAR A. MELLIN,

One of Counsel for Plaintiffs.

[Endorsed]: Filed February 25, 1953.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

The defendant, The Patent Scaffolding Co., Inc., makes answer to the amended complaint, as follows:

1.

Defendant admits the issuance of Letters Patent No. 2,438,173, but denies that said Letters Patent were duly and regularly issued, all in accordance with law.

Defendant denies that said Johnson is the owner of all of the entire right, title and interest in and to said Letters Patent No. 2,618,496, since paragraph V of the complaint makes allegation to the contrary.

The allegation in the complaint states that plaintiff, Upright, Inc., by virtue of an agreement in writing, became the exclusive licensee to make, sell and use the invention of said Letters Patent, which allegations constitute an assignment of the patent to Upright, Inc.

2.

The defendant denies each and every allegation in paragraph VI of the amended complaint.

3.

The defendant denies each and every allegation of paragraph VII of the amended complaint.

4.

The defendant denies each and every allegation

of paragraphs VIII and IX of the amended complaint.

5.

The defendant alleges "not guilty" to the prayers.

The defendant denies prayers I and II. No basis in the complaint has been made in support thereof.

The defendant denies prayer III.

6.

As a first affirmative defense: The Patent No. 2,438,173 is invalid as setting forth only an unpatentable combination.

7.

As a second affirmative defense: The Patent No. 2,438,173 has been patented or described in a printed publication prior to the patentee's supposed invention or discovery thereof, more than one year prior to the patentee's application for a patent therefor, to wit:

1. John M. Athans, U.S. No. 1,679,017 of July 31, 1938, for "Service Table."

2. F. Moore, U.S. No. 2,184,358 of Dec. 26, 1939, for "Adjusting Means."

3. F. Nielsen, U.S. No. 1,001,069 of Aug. 22, 1911, for "Pipe Coupling."

4. G. A. Hinckley, U.S. No. 135,988 of Feb. 18, 1873 for "Mechanism for Operating and Feeding Oil Wells."

8.

As a third affirmative defense: That the patentee was not the original and first inventor or discoverer

of any material or substantial part of the thing patented, on information and belief.

The following prior art patents, in addition to the patents listed in the preceding paragraph 7, show the general state of the art prior to the time the patentee entered the field:

1. C. W. Clattenberg, U.S. No. 953,896 of April 5, 1910 for "Turnbuckle Center."

2. E. T. Sutley et al, U.S. No. 467,866 of January 26, 1892 for "Temper Screw."

3. G. E. Turney, U.S. No. 1,432,810 of October 24, 1922, for "Temper Screw."

4. Clarence T. Mapes, U.S. No. 854,512 of May 21, 1907, for "Yoke and Yoke Screw."

5. E. Michelin, U.S. No. 750,675 of Jan. 26, 1904, for "Safety Bolts."

6. L. J. Davis, U.S. No. 1,840,187 of Jan. 5, 1932, for "Brake Rod."

9.

As a fourth affirmative defense: The prayer of the complaint asks for a fixed royalty. Defendant alleges that plaintiffs have not issued licenses with a regular and established uniform royalty. The plaintiffs have arbitrarily fixed the percentage in their complaint. On that allegation, the question of the fact of damage has been omitted, which is necessary to decide before the extent of damage can be shown. There is nothing to decide as a question of fact as to this royalty, if the amount mentioned stands alone. This leaves open for decision only the validity and infringement of the said patent, which are questions of law for the court, and not for the

jury, particularly because there cannot be a conflict as to the facts set forth in each of the said simple patents set up herein by the defendant.

10.

As a fifth affirmative defense: Plaintiff did not allege in its amended complaint that defendant infringed, since the issuance of the patent in suit, nor that any notice of the patent in suit and its alleged infringement was given to defendant prior to the defendant's acts alleged to be an infringement.

11.

As a sixth affirmative defense: There is no patentable invention in means for adjusting. There is no patentable invention in the patent in suit.

Wherefore, the plaintiffs should be dismissed as without law, with taxable costs and disbursements.

Dated March 24, 1953.

THE PATENT SCAFFOLDING
CO., INC.,

/s/ By V. W. MENG, President

/s/ C. P. GOEPEL,

/s/ J. E. TRABUCCO,

Attorneys for Defendant

/s/ E. D. BRONSON, of Counsel

Acknowledgment of Service attached.

[Endorsed]: Filed March 30, 1953.

[Title of District Court and Cause.]

MEMORANDUM DECISION

After the conclusion of the presentation of the evidence in this patent infringement case before a jury, both sides agreed to the dismissal of the jury and to the submission of the cause to the Court. It was also agreed that the Court's decision upon the issue of the validity of plaintiffs' patent would be decisive of the cause, i.e., a finding of validity would warrant judgment for injunction and damages, whereas a finding of invalidity would mean judgment for defendant.

In my opinion, the issue of validity here is one of law, or, at least, a mixed question of law and fact. The patent in suit claims an alleged invention of a portable scaffold leg. Plaintiffs contend it satisfies legal standards of invention because it is a combination of elements constituting a new unitary structure, having a new function and new results. To the contrary, it is contended that the patent discloses only old mechanical elements, aggregated, and therefore not inventive.

The controversy thus tendered is familiar. Decisions in the Ninth and other circuits in this field are many. The rule of law is clear and hence there is no need of citing the cases. A comparison of the prior art patents and the plaintiffs' patent, gives the answer.

In my opinion, all of the elements aggregated by plaintiffs function as taught in the prior art pa-

tents. Plaintiffs did not change nor bring to light anything new in the functioning of these elements. Hence the result is aggregation and not a patentable combination. It is good artisanship. But that is not enough to gain the reward of monopoly, which the Statute grants to the inventor. "He, who is merely the first to utilize the existing fund of public knowledge for new and obvious purposes must be satisfied with whatever fame, personal satisfaction, or commercial success he may be able to achieve. Patent monopolies, with all their significant economic and social consequences, are not reserved for those who contribute so insubstantially to that fund of public knowledge." *Dow Chemical Co. vs. Halliburton Oil Wells Cementing Co.*, 324 U.S. 320. See also *Gomez vs. Granat Bros.*, 9 Cir., 177 F.2d 266.

Counsel for defendant will present findings and conclusions in its favor.

Dated: October 27, 1954.

/s/ LOUIS E. GOODMAN,
United States District Judge

[Endorsed]: Filed October 27, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on regularly for trial before the above-entitled Court in the department of the Honorable Louis E. Goodman; a jury having been impaneled and sworn, and evi-

dence, both oral and documentary, having been submitted by both plaintiffs and defendant; thereafter and during the course of the said trial, both sides having stipulated that the jury be discharged and that the issues of the said case be submitted to the Court for determination; the testimony being concluded and the parties, plaintiffs and defendant, having submitted in writing their respective memoranda of points and authorities; the Court having considered the evidence herein, both oral and documentary, and the law applicable, does now make its

Findings of Fact

I.

On December 12, 1952, Up-Right, Inc., was a corporation duly organized and existing under and by virtue of the laws of the State of California, and had a place of business in Berkeley, County of Alameda, State of California.

II.

On December 12, 1952, The Patent Scaffolding Co., Inc. was a corporation of the State of New York, and had a regular and established place of business in the City and County of San Francisco, State of California.

III.

On December 12, 1952, Wallace J. S. Johnson was the owner of the entire right, title and interest in and to and under the Letters Patent No. 2,618,496, granted on November 18, 1952, on an application filed September 15, 1947, and Up-Right, Inc. was

the exclusive licensee to make, sell and use the invention of said Letters Patent.

IV.

On December 12, 1952, plaintiffs Up-Right, Inc. and Wallace J. S. Johnson filed a complaint for patent infringement against the defendant in Civil Action No. 32212 charging infringement by the defendant of said Letters Patent.

V.

On or about February 28, 1953, plaintiffs filed their amended complaint herein.

VI.

On or about March 24, 1953, defendant filed its answer to the amended complaint alleging invalidity of United States Patent No. 2,618,496 on the grounds that said patent sets forth only an unpatentable combination; that the invention claimed in the application for said patent had been described, prior to its filing date of September 15, 1947, in various printed publications, for more than one year prior to the patentees application for patent.

VII.

The essential elements of the single claim of the patent in suit are disclosed in the patents to: Countryman, 1,912,475; Taylor, 747,270; Burns, 1,181,734; Stevens et al., 351,474; Hinckley, 135,988; Birch, 210,235; Michelin, 750,675; Mapes, 854,512; Moore, 2,184,358; Uecker, 2,203,114; and Athans,

1,679,017. All of the said patents had been issued more than one year prior to the filing of the application which resulted in the patent in suit.

VIII.

Calipers embodying adjustments substantially like those in the patent in suit were well known for one year prior to the filing of the application which resulted in the patent in suit, as evidenced by defendant's Exhibit O and the Stevens Patent No. 351,474.

IX.

The Patent Office, in issuing the patent in suit, failed to consider the most pertinent art, specifically the patents listed in Finding VII.

X.

All of the elements of the claim in suit as aggregated by plaintiffs function as taught in the prior art patents.

XI.

Plaintiffs did not change, or bring to light, anything new in the functioning of these elements. The result of the claim in suit is aggregation.

XII.

More than one year prior to the filing of the application which resulted in the Johnson patent in suit, an adjustable supporting leg having telescopic leg members was well known as evidenced by Athans, 1,679,017; Moore, 2,184,358; Countryman, 1,912,475; and Uecker, 2,203,114.

XIII.

More than one year prior to the filing of the application which resulted in the Johnson patent in suit, an adjustable supporting leg having telescopic leg members and a clutch for holding such leg members against relative displacement was well known as evidenced by Athans, 1,679,017; Moore, 2,184,358; and Countryman, 1,912,475.

XIV.

More than one year prior to the filing of the application which resulted in the Johnson patent in suit, an adjustable supporting leg having telescopic leg members, the inner leg member of which is threaded and the outer leg member carries a releasable split nut engaging with the threads of the inner leg member and a releasable slidable collar holding the parts of the split nut in gripping relation with the threaded inner leg member, was well known as evidenced by Countryman, 1,912,475.

XV.

More than one year prior to the filing of the application which resulted in the Johnson patent in suit, a structure having inner and outer telescopic members, the inner member having a threaded portion and the outer member carrying a split nut engaging with the threaded portion of the inner member, and a releasable collar holding the parts of the split nut in clutching engagement with the said threaded portion of the inner member, was well known as evidenced by Countryman, 1,912,475; Tay-

lor, 747,270; Burns, 1,181,734; Stevens, 351,474; Hinckley, 135,988; Birch, 210,235; Michelin, 750,675; and Mapes, 854,512.

XVI.

More than one year prior to the filing of the application which resulted in the Johnson patent in suit, telescopic leg members held against relative movement by a releasable clutch, wherein the inner leg member has an enlarged cylindrical portion engaging with a complimentary bearing surface on the outer leg member to prevent lateral movement between the telescopic leg members, and wherein the cylindrical enlargement prevents the complete detachment of the telescopic leg members when the clutch is in gripping engagement with the inner leg member, were old as evidenced by Moore, 2,184,358.

XVII.

More than one year prior to the filing of the application which resulted in the Johnson patent in suit, a supporting leg having telescopic leg members, the inner leg member of which has a smooth cylindrical portion fitting within and against a complimentary bearing portion of the inner surface of the outer leg member, was well known as evidenced by Uecker, 2,203,114, and Moore, 2,184,358.

XVIII.

More than one year prior to the filing of the application which resulted in the Johnson patent in suit, inner and outer telescopic adjustable members,

the inner member having a threaded portion and the outer member carrying a split nut releasably held by a sliding collar in gripping engagement with the threaded portion of the inner member, and wherein the inner and outer members were capable of rapid adjustment with respect to each other by the release of the collar so the split nut no longer secures the said members against relative engagement, and wherein the two members were capable of fine adjustment with respect to each other as to overall length by the turning of the inner member while the split nut is held by the collar in gripping engagement with the inner member, were well known as evidenced by Taylor, 747,270; Burns, 1,181,734; Stevens, 351,474; Hinckley, 135,988; Mapes, 854,512; and Countryman, 1,912,475.

XIX.

More than one year prior to the filing of the application which resulted in the Johnson patent in suit, a supporting leg having telescopic leg members, the outer leg member having integral resilient fingers on its lower end, and a releasable collar for holding the resilient fingers in binding engagement with the inner leg member, was well known as evidenced by Athans, 1,679,017.

Conclusions of Law

I.

This Court has jurisdiction of the cause because the same arises under the patent laws of the United States.

II.

The claim of the patent in suit does not present a patentable combination.

III.

The structure of the patented claim fails to present a patentable invention.

IV.

The patented claim is invalid.

V.

The complaint is dismissed with costs to the defendant.¹

Dated: November 18, 1954.

/s/ LOUIS E. GOODMAN,
United States District Judge

Acknowledgment of Service attached.

[Endorsed]: Filed November 18, 1954.

In the United States District Court for the North-
ern District of California, Southern Division

Civil Action No. 32212

UP-RIGHT, INC., a corporation, et al.,
Plaintiffs,

vs.

THE PATENT SCAFFOLDING CO., INC., a
corporation, Defendant.

JUDGMENT

The above-entitled cause having come on regularly for trial before the above-entitled Court in the department of the Honorable Louis E. Goodman, the plaintiffs being represented by Mellin, Hanscom & Hursh, Oscar E. Mellin and Jack E. Hursh, and the defendant being represented by C. P. Goepel, J. E. Trabucco, Bronson, Bronson & McKinnon and E. D. Bronson; a jury having been impaneled and sworn; evidence, both oral and documentary, having been submitted by both plaintiffs and defendant; thereafter and during the course of said trial, both sides having stipulated that the jury be discharged and that the issues of the said case be submitted to the Court for determination; the testimony being concluded and the parties, plaintiffs and defendant, having submitted in writing their respective memoranda of points and authorities; the Court having considered the evidence herein, both oral and documentary, and the law applicable, and having heretofore made its Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed

(1) the Johnson Patent No. 2,618,496 is invalid and void;

(2) the plaintiffs are not entitled to recover damages from defendant; and

(3) defendant recover from plaintiffs its costs and disbursements in the sum of \$.

Dated this 18th day of November, 1954.

/s/ LOUIS E. GOODMAN,
United States District Judge

Approved as to Form:

MELLIN, HANSCOM & HURSH,
/s/ By LEROY HANSCOM,
Attorneys for Plaintiffs

[Endorsed]: Lodged November 10, 1954.

[Endorsed]: Filed November 18, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Plaintiffs above named, Up-Right, Inc., a corporation, and Wallace J. S. Johnson, an individual, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment for Defendant, The Patent Scaffolding Co., Inc., a corporation, and

against Plaintiffs, dated November 18, 1954, and entered in this action on November 19, 1954.

Dated: December 7, 1954.

MELLIN, HANSCOM & HURSH,
/s/ By JACK E. HURSH,
Attorneys for Plaintiffs

[Endorsed]: Filed December 7, 1954.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas, the plaintiffs have appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment of this court entered

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, United Pacific Insurance Company, a corporation duly organized and existing under the laws of the State of Washington, and duly authorized to transact a general surety business in the State of California, does undertake and promises on the part of the Plaintiff, to secure the payment of costs if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

It is expressly agreed by the Surety that in case

of a breach of any condition hereof, the above entitled Court, may upon notice to the Surety of not less than ten (10) days proceed summarily in the above entitled action in which this bond is given, to ascertain the amount which the Surety is bound to pay on account of such breach and render judgment therefor against the Surety and award execution therefor, all as provided by and in accordance with the intent and meaning of rule 34 of the Rule of Practice of the United States District Court in and for the Northern District of California.

In Witness Whereof, the corporate seal and name of the said Surety Company, is hereto affixed and attested at San Francisco, California, by its duly authorized officer, this 2nd day of December, 1954.

[Seal] UNITED PACIFIC INSURANCE
COMPANY,

/s/ By ROBERT M. CARLTON,
Attorney-in-Fact

Notary Public Certification attached.

[Endorsed]: Filed December 7, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below,

are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by both parties:

Complaint.

Amended Complaint.

Answer to Amended Complaint.

Memorandum Decision.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Cost Bond on Appeal.

Concise Statement of Points upon which Plaintiffs-Appellants Intend to Rely on Appeal.

Designation of Contents of Record on Appeal.

Designation of Defendant and Respondent of additions and objections to portions of the record on appeal designated by Plaintiffs.

One Volume of Reporter's Transcript of Trial Proceedings.

Plaintiffs' Exhibits 1 through 8, 8A, 10A, and 11 through 19, inclusive.

Defendant's Exhibits A, D through S, inclusive.

Note: (Plaintiffs' Exhibits 6, 7, 8, 10, 11, 12 and 19 and 8A, and 10A and Defendant's Exhibits Q and R are large exhibits and are in the exhibit room on mezzanine floor.)

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 12th day of January, 1955.

[Seal]

C. W. CALBREATH,
Clerk

In the United States District Court for the Northern District of California, Southern Division

No. 32212

UP-RIGHT, INC., a corporation, and WALLACE
J. S. JOHNSON, Plaintiffs,

vs.

PATENT SCAFFOLDING COMPANY, a corporation, Defendant.

TRANSCRIPT OF PROCEEDINGS

June 16, 17, 18, 1954

Before: Hon. Louis E. Goodman, Judge.

Appearances: For Plaintiffs: Messrs. Mellin, Hanscom & Hursh, by Oscar A. Mellin and Jack E. Hursh. For Defendant: Messrs. Bronson, Bronson & McKinnon, by Roy A. Bronson and J. E. Trabucco. [1*]

* * * * *

Mr. Bronson: Could I be heard a moment before the opening statement? This, if the Court please, is in the nature of a suggestion to the Court regarding procedure and it is in the interests of time.

The device involved here is a simple mechanical principle easily understood and explained; it won't involve the credibility of any witnesses. It has occurred to me to suggest to the Court, since the primary consideration here is whether the plaintiff

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

has a valid patent under the rules, that I should suggest to the Court that the Court might hear that aspect of the thing in the interests of time before the case that might later be submitted to the jury is heard. I have this in mind: It is a simple mechanical principle that involves elements that are easily understood. I won't argue the case here in the presence of the jury, but it presents strictly a matter of law without the introduction of any evidence. [3] * * * * *

WALLACE J. S. JOHNSON

was called as a witness on behalf of the plaintiff herein, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as hereinafter indicated.

The Clerk: Please state your full name to the Court and to the Jury.

The Witness: Wallace J. S. Johnson.

Direct Examination

Mr. Mellin: Q. Will you give your age and your residence, Mr. Johnson?

A. I live at 2 Wilson Circle, in Berkley, California. I am 41 years of age. [9]

Q. What is your occupation?

A. I am President and General Manager of the Up-Right Scaffolding Company.

Q. And what was your formal training or education, Mr. Johnson?

A. I graduated from the California Institute of

(Testimony of Wallace J. S. Johnson.)

Technology in Pasadena with a Bachelor of Science Degree in Mechanical Engineering.

Q. And what have been your occupations briefly from the time you left school?

A. That was in 1935. From 1935 until 1948 I was factory foreman for the Proctor and Gamble Company in Long Beach, where I was concerned with engineering in the manufacture of soap, the processes. From 1938 until approximately 1941 I was the manager and chief engineer of a firm whose name was Autometric Machine Tool Company in Berkeley, California. Later the name was changed to Production Engineering Company. And in that connection I was in charge of the design and the general manufacture and sale of jig boring machines which are very complicated process machines for the accurate measuring and boring of holes in jigs, tools and fixtures.

From 1942 to approximately 1945, I was with the Joshua Hendy Iron Works. The principal office of that Company was in Sunnyvale, California, but I had three principal locations with that concern; first, with the Eastern Division in [10] Ampere, New Jersey, where I was concerned with the re-design and the getting into production of an electrically operated gun turret for the U. S. Air Force. After that I was for a period of about a year assistant manager and Chief Engineer of the Pomona, California division of this Company where I was concerned with the manufacture of a complete line of pumps, principally irrigation pumps, but also for

(Testimony of Wallace J. S. Johnson.)

industrial and other purposes. And then the principal appointment I had with Joshua Hendy was in the Sunnyvale Plant where I was, among other things, in charge of the designing and development of new post-war products.

In 1945 I went into business for myself as a consulting engineer, mechanical engineer.

Q. And from there——

A. During 1945 and '46, I worked as a consulting engineer. Perhaps the main project which I did during that period was the design of a complete line of irrigation pumps for a concern in Monterey, Mexico. They are now manufacturing those pumps.

Q. And when did you become associated with Up-Right, Inc., the plaintiff here?

A. The business started as a personal proprietorship. We were called Up-Right Scaffolds.

Q. Who were the proprietors?

A. I was the proprietor. And that failed during the year [11] 1947, which was our first year of manufacturing. On January 1st, 1948, we incorporated, I and two other stockholders, and since January 1st of 1948, it has been a corporation.

Q. And where is the Up-Right, Inc. located, Mr. Johnson?

A. Its principal office, its head office is in Berkeley at 1013 Pardee Street, and our Western factory is there; and we have an Eastern factory in Teterboro, New Jersey.

Q. What is the principal product of that Company?

(Testimony of Wallace J. S. Johnson.)

A. We manufacture portable aluminum scaffolds.

Q. Over what territory are those scaffolds sold?

A. We have sold them in all states of the United States and in several foreign countries.

Q. And over what period of time, Mr. Johnson?

A. Starting February 28, 1947, when we made our first shipment, until the present time.

Q. As of about February 1st, 1953, how many employees, roughly, did Up-Right Inc. have?

A. Approximately 90 employees.

Q. I hand you United States Letters Patent No. 2,618,496 which were issued the 18th day of November, 1952, and ask you if you are the Wallace J. S. Johnson named as the patentee therein?

A. Yes, I am.

Mr. Mellin: I will offer that in evidence, Your Honor, as Plaintiff's Exhibit 1. [12]

(Whereupon, U. S. Letters Patent No. 2,618,496 was received in evidence and marked Plaintiff's Exhibit No. 1.)

[See Book of Exhibits.]

The Court: What is the date?

Mr. Mellin: The date is November 18, 1952, Your Honor. And by the way, Your Honor, there has been some question heretofore raised on the question of notice of the patent to the defendant, and for that purpose we on the record waive damages prior to December 12, 1952, which is the date that the original complaint was filed in this action. We are contending for damages only from the date

(Testimony of Wallace J. S. Johnson.)

of the filing of the original complaint to the date of filing the amended complaint.

Mr. Mellin: Q. Mr. Johnson, what interest, if any, does Up-Right Scaffold Company, Inc. have in this patent, Exhibit No. 1?

A. Up-Right, Inc., the Corporation, has an exclusive license to manufacture and sell devices embodying the invention sold in the patent. [13]

* * * * *

Mr. Mellin: Q. Was that license granted to the Up-Right, Inc. in writing or orally, Mr. Johnson?

A. It was a written agreement, contract.

Q. I hand you what purports to be a license agreement dated January 5, 1948 between Wallace J. S. Johnson and Up-Right, Inc., a Corporation, and ask you if you can identify that agreement?

A. Yes, this is the exclusive license agreement between me and Up-Right, Inc.

Q. Does that pertain to the patent in suit, Exhibit 1?

A. Yes, it includes this particular patent.

Q. Is that your signature on the agreement?

A. Yes.

Q. And the other signature is——

A. W. F. Funk, who is secretary-treasurer of the Corporation. [14]

Mr. Mellin: I will offer this document in evidence as Plaintiff's Exhibit No. 2.

Mr. Bronson: No objection.

(Whereupon Agreement dated 1-5-48 between Johnson and Up-Right, Inc. referred to and

(Testimony of Wallace J. S. Johnson.)

described above was received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Mellin: At this time, Your Honor, I would like to offer in evidence on behalf of the plaintiff a certified copy of the proceedings had in the Patent Office referring to the issuance of the patent in suit, Exhibit No. 1.

Mr. Bronson: Counsel, you call that the file wrapper?

Mr. Mellin: File wrapper.

Mr. Bronson: May we refer to it for the benefit of the Court and Jury as the file wrapper?

The Court: Yes. The proceedings before the Patent Office when you apply for a patent, instead of being called a record, they call it the file wrapper. I don't know why that is, but that is the name.

(Whereupon file wrapper of Patent No. 2,618,496 was received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Mellin: At that time the Patent Office referred to certain prior United States Patents in passing on the application, and I offer those patents in evidence as [15] plaintiff's next in order.

(Whereupon certain prior patents referred to were received in evidence and marked Plaintiff's Exhibit No. 4.)

[See Book of Exhibits.]

Mr. Mellin: Q. With respect to the agreement, Exhibit 2, Mr. Johnson, are there any other agreements that you or the Company made with reference to the patent in suit, Exhibit 1?

A. No.

(Testimony of Wallace J. S. Johnson.)

Q. And the agreement, Exhibit 2, is that to your knowledge still in force and effect, or not?

A. It is still in force and effect, yes.

Q. Will you state briefly the purposes for which Up-Right, Inc. was formed?

A. The Corporation of that name was formed to take over the new scaffold business which had been started as a personal proprietorship approximately a year before that.

Q. In connection with what, if any, products?

A. It was incorporated for the manufacture and sale of portable aluminum scaffolds.

Q. Will you state whether or not you conducted any development work in connection with those scaffolds prior to the forming of the corporation?

A. Yes; as early as December 1945, another man named Thomas Harvey and I worked out an idea for a folding scaffold section—portable folding section. [16]

Q. Is that the aluminum portable type that you have been speaking of? A. Yes, that's right.

Q. Well, will you state whether or not that was the type that you manufactured? [17]

* * * * *

Q. And will you state whether or not that was the type you did the development work in connection with?

A. In that period from December of '45 until February of '47, that was the type, yes.

Q. I show you letters patent of the United States No. 2,438,173, March 23, 1948 to yourself and

(Testimony of Wallace J. S. Johnson.)

Mr. Thomas H. Harvey entitled "Portable and collapsible scaffolding unit," and I will ask you if that illustrates the type of scaffold on which you did development work during that period that you have testified to?

A. Yes, this patent covers that invention.

Mr. Mellin: May I offer that, Your Honor, in evidence, as plaintiff's next in order?

(Thereupon letters patent No. 2,438,173 referred to above was received in evidence and marked Plaintiff's Exhibit No. 5.)

[See Book of Exhibits.]

Mr. Mellin: Q. Referring to Exhibit 5, Mr. Johnson, would you tell us what if any type of adjustments were possible with that with respect to elevating any part of the scaffold?

A. This patent wasn't concerned with the adjustable legs on the scaffold.

Mr. Mellin: Would you read him the question, please?

Q. I am asking you if it discloses any type of adjustable legs, Mr. Johnson? A. No.

Q. At the time that you and Mr. Harvey developed the scaffolding [18] shown in the patent, Exhibit 5, what did you do with respect to adjustment of legs in the matter?

* * * * *

A. We—Mr. Harvey and I, if you are including the two of us in the word "you"—did nothing about it because he was getting involved in another business and had other employment and other interests;

(Testimony of Wallace J. S. Johnson.)

but I started working on the problem of developing an adjustable leg because I realized that that was essential to make the new portable aluminum scaffolding possible—practical. [19]

Mr. Bronson: I ask that the latter part of the answer go out as not responsive, talking about conclusions.

The Court: That part of the answer starting “because I realized” may go out.

Mr. Mellin: Q. Will you state whether any problem presented itself to you at that time with respect to adjustment vertically of a scaffold unit of this type?

A. The problem that presented itself to me at that time was that a portable aluminum scaffold needed an adjustable leg.

Q. And did you make any investigation at that time or not with respect to devices that could be employed for that purpose? A. Yes.

Q. And will you tell us what those investigations were and what you found in them?

A. Investigations that were made during that time included examination of all the types of scaffolds that were commercially on the market in this area. They included studying and review of all types of adjustable mechanisms in the engineering and technical literature in libraries and in text books.

Q. And will you state whether or not you found in those investigations any devices which answered

(Testimony of Wallace J. S. Johnson.)

the problem which you stated was existent at that time? [20]

* * * * *

Mr. Mellin: Q. Mr. Johnson, what requisites were required for adjustability of the scaffold of the type you designed?

A. For a portable scaffold there were a number of what I thought to be severe requirements. For one thing, the scaffold leg or adjustable mechanism of whatever kind it was, [22] had to be so fixed within the structure or the tubular outer leg of the scaffold that it would sustain sidewise loads as well as vertical loads, because in a portable scaffold which rolls by itself from position to position it normally is not fastened to a building or other structure which will take side loads, and therefore the scaffold had to—the leg had to be strong adjusted in any position so that sidewise it wouldn't buckle. That would be one very important characteristic of it.

Another would be that the scaffold would have to take a vertical load in any position of the adjustment, because the entire weight of people or material on the scaffold would rest directly on the legs of the scaffold, and it being unattached to anything else, it would have to absorb all that load by itself.

Another characteristic of the leg would have to be that it was firmly and positively locked within the structure of the scaffold, because you see moving it along from position to position implies rolling it over curbings or other holes in the ground or floor,

(Testimony of Wallace J. S. Johnson.)

and the leg couldn't by any means fall out, either by the fact that it wasn't frictionally tight in there or it was just loose in there; it had to be positively locked in there so when it was rolled over a hollow point in the floor or ground it wouldn't fall out.

Another requirement was that it had to be able to be adjusted for a coarse or a large adjustment quickly and easily, because the inherent nature of the concept of the scaffold was that it had to be easily moved from position to position and each position had a different conformation of the ground or terrain, so that instead of something that had to be laboriously screwed or otherwise adjusted up and down it had to have a rapid adjustment quick and easy over a considerable distance.

I should say another characteristic that it requires for a portable concept of scaffold is that it have a fine adjustment so that after you made the coarse adjustment and you are up on top of a structure which is depending entirely upon itself for its stability and a fine adjustment had to be made so that it can have no wobble in the structure—if it were stationary or static form of scaffolding fastened to a wall, it wouldn't be so important then to have a fine adjustment so that it would be stable when it was adjusted.

Q. At the time when you went into this portable scaffold business was there a commercial device as far as you know in portable scaffolding of the nature that you described in this scaffolding field?

(Testimony of Wallace J. S. Johnson.)

A. No, sir. [24]

* * * * *

Mr. Mellin: Q. Will you answer, Mr. Johnson?

A. As far as I knew there was no such device on the market.

Q. And in the order—in the chronological order of things did this adjustable leg that forms the subject matter of the patent in suit Exhibit 1, come with this earlier conception of your scaffold or not?

A. No, it came later.

Q. You are familiar of course, with the features of the patent in suit, Mr. Johnson?

A. Yes.

Mr. Mellin: This is an enlargement. I will hand it to the Court—an enlargement of the patent drawing colored up so it can be explained. I offer that, Your Honor, in evidence as the next in order. It is an enlargement of the patent drawing of the patent in suit, Exhibit 1, which has been colored.

(Thereupon enlargement referred to above was received in evidence and marked Plaintiff's Exhibit No. 6.) [25]

(Thereupon Plaintiff's Exhibit No. 6 was placed upon the board.)

Mr. Mellin: Q. Mr. Johnson, from the enlargement of the patent drawing, Exhibit 6, that we have put on the board and its coloring, would you take a pointer and explain the construction and the operation of the device therein illustrated; and while you are doing it, would you point out whether

(Testimony of Wallace J. S. Johnson.)

it has or has not the characteristics to which you referred?

Your Honor, may I hand you a copy of the patent so that you may follow it.

The Court: Yes.

The Witness: The upper part of this structure with the large number of little numbers on it comprises the scaffold.

Mr. Mellin: Q. Just a minute, Mr. Johnson. Does that in a general way indicate a scaffolding unit of approximately the size and construction of that I have my hand on in court?

A. Yes, approximately. And it is supported by four legs which are shown on different levels to illustrate the fact that those legs are adjustable to accommodate the scaffold to an uneven surface.

Q. Just a moment, Mr. Johnson. I hand you a portion of the device or scaffold and ask you if this accurately illustrates the device of the patent in suit.

A. Except that this is shortened for the purpose of being [26] grasped, this device accurately describes the device under controversy here.

Mr. Mellin: May I offer that in evidence, Your Honor, as next in order.

(Whereupon illustrative device was received in evidence and marked Plaintiff's Exhibit No. 7.)

The Witness: Each one of these four—

Mr. Mellin: Q. Just a minute, Mr. Johnson, please.

(Testimony of Wallace J. S. Johnson.)

I hand you Exhibit No. 7, the mechanical device which you have testified illustrates the device of the patent in suit, and ask that you use that device in conjunction with the drawing so that you will be able to fully explain the construction and mode of operation of the device?

A. This device which I hold in my hand would correspond to numbers ten and seventeen as indicating the over all elements of each one of these four legs. And in Figure 2, I would say that this figure illustrates the same thing that this model does in the way of one of the individual legs. Figure 2 shows——

Q. Figure 2, is that showing the hollow part of the leg cut longitudinally in half, that is, in sections?

A. Yes, this Figure 2 is a vertical cross-section right through the outer part of the leg so that you can see the inner leg inside it.

Q. What does the piece that is colored yellow indicate, [27] Mr. Johnson?

A. The portion of the inner leg that is colored yellow is the threaded portion of the inner leg, the same as this exposed threaded portion of it.

Q. Of Exhibit 7? A. Yes.

Q. And the part colored red is what, Mr. Johnson, on the drawing?

A. The part colored red shown in cross-section—vertical cross-section as if you took a slice right down through it in the drawing—is this outer collar of Exhibit 7.

(Testimony of Wallace J. S. Johnson.)

Q. And what is the part colored green on the drawing?

A. Well, there are two parts colored green. Light green is the——

Q. Light green, then.

A. Light green shows the outer tubular leg corresponding to this outer tubular leg of the scaffold structure.

Q. That is a fixed leg, it is part of the whole scaffold unit, is that correct?

A. Yes, that comprises—that is a part; it is a vertical column or post of the scaffold.

Q. And what is the dark green?

A. The dark green——

Q. Referring to both Figure 2 and Figure 3, Mr. Johnson?

A. The dark green portion shown in cross-section in Figure 2 [28] and shown exposed in side view in Figure 3 is the nut which is a part of and rigidly welded and attached to the light green tubular leg or post of the scaffold. By raising the collar on this model, I can show you the same thing. This portion, the larger outside diameter welded to the end of this tube, is the nut.

Q. Would you go on from there and explain its use and mode of operation, Mr. Johnson?

A. The nut has been split into segments as shown in Figure 3, and as you see in the model, after being welded on to the end of the tube, so that the segments of the nut are a part of each one of these fingers, you might call them.

(Testimony of Wallace J. S. Johnson.)

Q. Fingers. Is that labeled in Figure 3 of the drawings, Mr. Johnson?

A. No. 21 seems to point to one of the fingers or to the complete nut. The splits are shown at 19 on the drawing.

Q. What is the effect of splitting that nut and splitting the bottom of the tube into these fingers?

A. The effect of splitting that nut and tube to cause the creation of those fingers is so that the nut will open up when the collar is raised and therefore disengage itself from the threads of the inner leg.

Q. The interior of the nut, as I understand it, is threaded to match the threads from the interior leg?

A. The interior of the nut has a corresponding internal [29] thread which fits the external thread of the inner leg.

The Court: When the collar is down?

The Witness: When the collar is down.

The Court: Then the space is eliminated and the whole portion of the collar is sealed all around, is that right?

The Witness: Yes, when the collar is down it moves the segments of the nut back into the original relationship they were in before the nut was split, or the tube was split, and it then is in effect a solid nut which can be rotated like a screw thread on the inner leg.

Mr. Mellin: Q. When you rotate it like a screw thread, what adjustment if any is effected?

A. When the nut is rotated on the screw thread,

(Testimony of Wallace J. S. Johnson.)

it provides an upward or downward adjustment of the scaffold leg.

Q. All right; will you proceed from there, Mr. Johnson?

A. The fine adjustment is accomplished by screwing the leg, the inner leg, in and out of the nut, because you see the scaffold structure, this outer tubular leg is stationary to the inner leg and is turned to adjust the scaffold. For coarse adjustment, one of the other features required of a portable scaffold, the collar is raised and then the structure can be raised up and down great distances—far more than on this short model—to make a rapid major adjustment in the level of the scaffold so that you don't laboriously have to screw the inner leg up and down so many turns per inch by [30] hand.

Q. What about its ability, if it has such, to be able to have a man unscrew the entire leg from the scaffold?

A. The inner threaded leg has an unthreaded portion, No. 17 here shown in blue, which unthreaded portion of the leg is long enough so that it remains inside of the scaffolding structure or column or tube all the time and prevents the leg from ever being extended out too far. In other words, that unthreaded portion, no matter if the leg is badly extended, cannot thread itself through the nut, nor is it possible for the nut to be clamped on that unthreaded portion of the tube. Therefore that unthreaded portion is always down inside of the

(Testimony of Wallace J. S. Johnson.)

scaffold leg to give the scaffold sideways stability, so that the leg won't buckle. If this unthreaded portion were not there, the leg could be foolishly or otherwise by a workman unscrewed entirely to where there were just a few teeth holding and the scaffold would be buckling as you would push on it. So the unthreaded portion on this inner leg provides that sideways stability that is necessary in a portable aluminum scaffold, and it also has the function of making sure that whenever the nut is engaged, this leg cannot fall out.

In other words, if you roll from a position to position as you are using this scaffold, over a hollow place on the floor or ground, as long as this nut is engaged it is never possible for that mechanism to fall out; it has this securely [31] fastened outer part to the inner part that is a threaded nut.

Q. What would you say about its ability to sustain a load?

A. Its ability to sustain a vertical load?

Q. Yes.

A. The fact that this nut was a solid nut welded right on to the end of this full vertical outer tube which is the first column of the scaffold, and the only thing that has been done to it when the nut is in its position with the collar down, in engagement with the collar, the only thing that there is is these few slits through the sides of this nut and tube, and for all practical purposes the nut and tube are just as strong as they were before it was split. Tests have indicated that also, and therefore

(Testimony of Wallace J. S. Johnson.)

the leg mechanism will hold as great a load as the scaffold structure itself. It is very important that the leg not be a relatively weak thing; otherwise your scaffold would be resting on a weak foundation.

Q. Would you state whether or not there is any ability in that to jar the nut loose in operation?

A. That is another point that I haven't had a chance to mention before. That is an essential feature of a portable scaffold, in that when they are moving from position to position on wheels, things tend to jiggle or vibrate the structure, which is a problem not encountered in a static scaffold. Therefore it is important that when this mechanism is locked—in other words, the collar down over the nut as [32] you see it in this position,—that there be no tendency for the collar to ride up due to vibration or any other reason.

Q. I notice in the model you have in your hand some latch provision provided. Is that provided in the patent or not?

A. No, this rotation provision here within the little segment which protrudes out of the tube here is not part of the patent under discussion. What I am referring to is the fact that this nut is a straight cylindrical nut; it isn't a tapered nut; it isn't like a cone; it is a straight cylindrical nut from this portion here, which is element No. 21, and therefore since the collar is also cylindrical on the inside, when the collar is shoved down over the nut, it is just one cylinder over another and there is no component force that would cause the collar to ride

(Testimony of Wallace J. S. Johnson.)

up under operation; in fact, gravity is always pulling the collar straight, keeping the nut engaged with the inner leg.

Q. I show you, Mr. Johnson, a scaffold here in the court room and ask if it is fitted with legs of the type described in the patent in suit?

A. Yes, it is.

Mr. Mellin: May I offer that scaffold in evidence?

(Whereupon scaffold referred to above was received in evidence and marked Plaintiff's Exhibit No. 8.)

Mr. Mellin: With the Court's permission, may Mr. Johnson [33] approach the scaffold?

The Court: Surely.

Mr. Mellin: Q. Do you have something with you by which you can show the Jury the manner in which this scaffold with the patented legs, adjustments can be ordinarily made?

A. Yes, I do.

Mr. Mellin: Can the Jury see it if it is over here, or would be it better——

The Court: They will have to look over the tops of the box from wherever it is. If the Jury wishes to stand up they may do so.

The Witness: Obviously the condition in this court room, even though this floor is probably slightly off level, it isn't the typical thing encountered in using a scaffold on a street or floor or over curbs or other obstructions. So to illustrate the adjustability of the legs to meet such usual uneven

(Testimony of Wallace J. S. Johnson.)

surfaces, I have just used these three objects, a waste basket and two blocks of wood, to give three different levels other than the level of the floor itself.

In positioning an adjustable scaffold, naturally you would put the retracted leg on the highest object and then extend the others. So in this case, to level the scaffold it is merely necessary to adjust the leg in that manner (indicating). As you can see, the adjustment of the scaffold is accomplished rapidly as far as the coarse adjustment is [34] concerned; and then if it is found that the scaffold is slightly off-level, this fine adjustment can be made by turning one leg, as, for example, this leg seemed to be a little bit high, therefore I made a few turns on it, and it makes the scaffold substantially level.

Q. Thank you, Mr. Johnson. Will you tell us please, Mr. Johnson, when you first produced a scaffold of the type you have just been demonstrating; that is, with legs of that type?

A. To the best of my recollection, it was that I built this, was during August and September of 1946.

Q. Was that a commercial device or otherwise?

A. That was an experimental model which we tried out in October of 1946 to paint my house.

Mr. Mellin: Will you mark these for identification?

Mr. Bronson: For Identification?

Mr. Mellin: Yes.

(Testimony of Wallace J. S. Johnson.)

(Whereupon book containing four photographs was marked Plaintiff's Exhibit No. 9 for Identification only.)

Mr. Mellin: Q. In the scaffold, this demonstrating or experimental device that you built to use for painting your house, did that operate successfully? A. Yes, it did.

The Court: Are you referring to the device that is in the [35] patent in suit?

Mr. Mellin: That is right.

The Court: With adjustable legs?

Mr. Mellin: That is correct, Your Honor.

Mr. Mellin: Q. I hand you a book containing four photographs, and ask you what those photographs depict, please. [36]

* * * * *

The Court: Q. You had a scaffold with the same device on it as Exhibit No. 8?

The Witness: Yes.

The Court: And you first used that when?

The Witness: In October of '46—1946.

The Court: To paint your own house?

The Witness: That is right.

The Court: Did it work all right?

The Witness: Yes.

The Court: Did it work in the way that you have stated that this one works?

The Witness: Yes.

The Court: Is that what you wanted? [37]

Mr. Mellin: I wanted that and I wanted to show the pictures because this is a part of—

(Testimony of Wallace J. S. Johnson.)

Mr. Bronson: He wants the pictures of Mr. Johnson's house and Mr. Johnson in a pair of jumpers. I submit that Your Honor's questions answer it fully.

Mr. Mellin: I submit it does not, Your Honor.

The Court: I will reserve ruling on this. If it is necessary, we will let it in later, but at the moment I think the witness has described what happened. [38]

* * * * *

Mr. Mellin: Q. Mr. Johnson, you named this morning certain requisites that a scaffold must have to be properly operative. Could you state whether or not the scaffold fitted with the legs of the patent would have those requisites?

A. Yes, they do. Yes, it does.

Q. Would you approach the device which you assembled, this Exhibit 8, and explain to the Jury if you will the advantages which this scaffold has with the patented legs?

A. In the first place, you will notice that as you lift the scaffold, or for example as you are working on it, if you tilt the scaffold, the legs do not fall out. And in the old familiar screw jack type of leg in which there merely threaded leg here and the rotating nut here, if you tilt or lift the scaffold or roll it over a hole in the floor, a leg would be apt to fall out. Therefore it would be a very great safety hazard and certainly not usable as a portable ladder. [39]

You will notice that with the leg in any ad-

(Testimony of Wallace J. S. Johnson.)

justed position and with the collar down over the nut, in effect making it a solid nut against the threads of the leg, you have a construction here which essentially is the tubular column or post of the scaffold itself; as the nut is held in position you merely have these two slits in the tube, so as a vertical load-carrying member it is substantially as strong as the structure above.

You will also notice that the upper portion of the leg is unthreaded and that therefore the leg with this unthreaded portion always inside always has a portion of the leg inside of the outer leg, and therefore it holds the leg fast or in a stable manner so that if any force pushes on the side of the scaffold, you do not—if you have a force pushing on the side of the scaffold, such as when a man is rolling it and we come to a dip, or for any other reason, there is no chance of this leg buckling because there is always that unthreaded portion up inside of the other leg, no matter how far you extend the leg, even up to the maximum, 24 inches.

Q. You spoke about it not falling out. Demonstrate why it is impossible for it to fall out, Mr. Johnson.

A. Because the threads of the inner leg are fitted closely with the threads of the nut which is held in position by this locking collar. Therefore it cannot fall out, the nut being a solid part of the tube. [40]

Q. Can the leg be screwed out?

A. Yes, it can, but only to where the threads

(Testimony of Wallace J. S. Johnson.)

end. Therefore, a man could never screw the leg out too far, though he had the threaded portion inside and the nut might be holding by one or two teeth or it might not be holding on and the nut would be merely resting on top of the screw.

And another feature it obviously has is it has a fine adjustment which can be made at any time to take any slight amount of looseness out of the structure or any slight inaccuracy in the coarse adjustment in regards to the slope of the ground or floor. Then the vertical rapid adjustment is obviously incident to any position that you want to make it; you merely move the scaffold to the level desired and then lock that nut again, thereby getting an immediate rapid adjustment to where you want to go.

A final feature that might be mentioned is that now as you roll this scaffold from place to place, moving along on the floor or ground or sidewalk or whatever it was, that this nut turning on the collar here has no tendency to rise up because it is, as shown on the drawing, secured on the cylindrical portion of that nut and therefore there is no force causing it to ride up or vibrate or anything; gravity is always holding it in position. So those are the ways in which this adjustable leg mechanism makes a portable scaffold practicable. [41]

Q. In the manufacture and sale of scaffolds with this leg, have you sold or offered these legs separate from the scaffold as such?

A. No, they are never sold separately.

(Testimony of Wallace J. S. Johnson.)

Q. Would that be a practical thing or not?

A. No, because it is a built-in feature, a part of the scaffold itself.

Q. I show you an end frame of a scaffold with adjustable legs on it, Mr. Johnson, and ask you if you will tell us what it is, please?

A. That is an end frame of a scaffold manufactured by the defendant in this case.

Q. Did you procure just this part or the whole scaffold?

A. No; we bought the entire scaffold through another concern. That is practically identical to the scaffold erected there.

Q. When was that bought, Mr. Johnson?

A. I think there is a definite record on that. To the best of my recollection, it was in late November or early December of 1952.

Q. Was it prior to the issuance of the patent in suit, which was November 18, 1952, or subsequent to it?

A. We purchased it a little after the issuance of the patent in suit.

Q. You are familiar with the construction and operation of this device? [42]

A. Yes. That is simply one of the two frames that went with the scaffold, and it also had a platform and braces as do the other.

Q. Approaching the scaffold, would you show the Court and Jury the construction of the legs and the manner of its operation?

A. The same collar surrounds the nut so that

(Testimony of Wallace J. S. Johnson.)

when the leg in the scaffold is raised you get the same type of adjustment.

Q. Will you show us the similarities, if any, and the differences, if any, between that and the device that was shown in the patent in suit?

A. It is the same device and works in the same manner.

Q. Is there any difference at all, Mr. Johnson?

A. Well, to the best of my knowledge, there are three. This slot in the tube here is slightly shorter than this tube.

Q. Would that in any fashion or not change the function or mode of operation of the device?

A. It has no relationship to the function or mode of operation.

Q. And the next?

A. This little button here is a different means, providing a little accessory latch arrangement than the one that was described before; but in neither case is that a part of the patent mechanism at issue, but that is a difference in these [43] two devices.

The third difference that I have been able to observe is the fact that this nut here has a shoulder on it, whereas the plaintiff's device does not have a shoulder on it.

Q. What change, if any, does that make in the function or mode of operation of the device?

A. None.

Mr. Mellin: May I offer that in evidence, Your Honor, as the next exhibit?

(Testimony of Wallace J. S. Johnson.)

(Whereupon end frame of scaffold, heretofore referred to and more particularly described, was received in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. Mellin: Mark this for Identification.

(Whereupon an enlarged chart, more particularly described hereinafter, was marked Plaintiff's Exhibit No. 11 for Identification Only.)

Mr. Mellin: Q. I show you a chart, Mr. Johnson, and ask you if you are familiar with it?

A. Yes.

Q. Would you tell us what that chart depicts, Mr. Johnson, please?

A. The chart shows three adjustable legs: Figure 1, Figure 2 and Figure 3. The upper view shows the leg unlocked, and the lower view in each case shows the leg locked or the [44] nut retracted into the threads of the inner leg.

The first figure shows the device as it was drawn in the patent drawing, the patent that was issued, the one that is under discussion here.

The second figure shows the device as commercially manufactured now by Up-Right and which is shown in the exhibit of the scaffold on the floor.

And the third shows the device as manufactured and as we purchased the device entered in the most recent exhibit manufactured by the defendant.

Q. Does that drawing accurately show all the three devices you have spoken of? [45]

* * * * *

(Testimony of Wallace J. S. Johnson.)

Mr. Mellin: Q. Would you compare the devices shown in figures 1 and 3 and tell us the similarities, if any, and the differences, if any, between the two adjustable scaffold legs shown on that chart, Exhibit No. 11 for Identification?

Mr. Mellin: May I interpose there and offer that in evidence on the testimony of the witness that it is accurate?

The Court: All right; it may be admitted.

(Whereupon Plaintiff's Exhibit No. 11, previously marked for Identification Only, was received and marked in evidence.) [47]

* * * * *

Mr. Mellin: Q. Would you compare Figures 1 and 3, if you will, showing the similarities, if any, between the construction of the two and the mode of operation of the two. As I understand your testimony, Figure 1 shows the device as shown in the patent in suit, Exhibit 1? A. Yes.

Q. And Figure 3 shows the defendant's accused device?

A. That is right. Figure 1 shows in light green color a tubular leg or column of a scaffold. The same light green color shows the same type of tubular leg column of a scaffold in Figure 3. On the end of that light green colored tube is fixedly attached a nut, a segmented nut, No. 21 in the patented device. The same nut, No. 21, is shown fixedly attached to the tube in the defendant's device as shown in this drawing.

The collar shown in red, No. 24, that slides up

(Testimony of Wallace J. S. Johnson.)

and down and presses the segments of the nut, is shown in Figure 1 on the patented device; and the same collar with the same color and with the same number is shown to function in the identical manner in the defendant's device.

The blue unthreaded portion of the leg, inner leg, is shown in both Figure 1 and Figure 3 as a part of that inner [48] leg and to have the same function in both cases.

The yellow threaded portion No. 17(a) in both Figure 1 and Figure 3 is shown to function in the same manner.

Q. And what differences, if any, are there between the devices in construction?

The Court: Hasn't he already testified to that?

Mr. Mellin: Yes, Your Honor.

The Court: I think he already answered that, didn't he?

Mr. Mellin: All right.

The Court: He has pointed out three differences.

* * * * *

Am I correct about that?

Mr. Mellin: That is correct, Your Honor.

The Court: That is the reason why I am admitting them. They may be further explanatory of the physical devices.

Mr. Mellin: That is correct, Your Honor.

The Court: I am not so sure that they are, but that is [49] what patent lawyers always like to do; they always want to put documents in. You can see

(Testimony of Wallace J. S. Johnson.)

the thing much better than you can from the diagram. But the Jury is not bound by my statement in that regard; you draw your own conclusions.

Mr. Mellin: Q. Now, Mr. Johnson, comparing the two devices that we have—that is Exhibit 8 and Exhibit 10—would you compare the inner legs for us of the two devices precisely and show whether or not they have any precise characteristics as far as dimensions or physical appearance is concerned.

Mr. Bronson: As I understand this, if the Court please, it is merely a repetition of something that has already been shown. Am I right in that?

Mr. Mellon: No; you are confused there, Mr. Bronson.

Mr. Bronson: All right, I will withdraw it.

Mr. Mellin: It will only take a second, Your Honor. I want to show that the inner legs are precisely alike, not only in function.

Mr. Mellin: What leg is that you have there?

A. This leg is the leg from the device as manufactured and patented by Up-Right.

Q. In your left hand——

The Court: You had better give it a separate number because sometime or other it may be necessary to refer to it.

Mr. Mellin: Will you make that 10-A? [50]

The Court: Mark that 10-A, Mr. Clerk, so that we won't be confused about it.

(Whereupon leg referred to and more particularly described above was marked Plaintiff's Exhibit No. 10-A in evidence.)

(Testimony of Wallace J. S. Johnson.)

Mr. Mellin: And the leg of the Up-Right scaffold, will you make that 8-A?

The Court: That is right.

(Whereupon leg referred to above and more particularly described was marked Plaintiff's Exhibit No. 8-A in evidence.)

Mr. Mellin: Which one is which?

The Witness: This is the leg that is manufactured and patented by Up-Right.

Q. That is 8-A? A. Yes.

The Court: You had better mark it now.

Mr. Mellin: And this is 10-A the accused device.

Mr. Mellin: Q. Now, would you compare the diameter and the other physical characteristics of the two devices 10-A and 8-A?

A. Within a fraction of an inch, the two devices are identical. The unthreaded portions also within a fraction of an inch are the same length, and the threaded portion of each leg is within a fraction of an inch of the same length. [51]

Q. In Exhibit 8-A, which is the Up-Right leg, does that have the standard thread?

A. No, it has a thread which is particularly designed for this scaffold.

Q. How does that thread compare with the thread in 10-A, the accused device?

A. For all practical purposes, it is identical, because the two are interchangeable. [52]

Q. Will you show us that please? What leg do you have in your hand?

A. The defendant's leg. (Demonstrating.)

(Testimony of Wallace J. S. Johnson.)

Q. Thank you, Mr. Johnson. For how long has Up-Right been manufacturing a scaffold of that identical construction, Mr. Johnson?

A. Since February 28, 1947 when we delivered the first four scaffolds.

Q. Bearing in mind that the patent in suit, that is Exhibit 1, was applied for in September of 1947 and issued in November of 1952, having those dates in mind, when was it that you first discovered that the defendant was employing the adjustable leg such as you have demonstrated in Exhibit 8?

A. It was in November of—let's see, November of 1951, I believe it was.

Q. And were you familiar with the type of leg that the defendant was using in their portable scaffold prior to that time? A. Yes.

Q. I show you a device and ask you if you can identify it. If you can, tell us what it is.

A. The portion of it that I have in my left hand is a leg manufactured by the defendant prior to their changing to their present construction.

Q. By their present construction, you are referring to the [53] legs of Exhibit 10?

A. Yes. This outer tube happens to be just a tube from our factory, but it works in exactly the same manner because it was the leg on the scaffold from which this leg came.

Mr. Mellin: May I offer that assembly in evidence as illustrating the witness' testimony as the next in order?

The Court: Very well.

(Testimony of Wallace J. S. Johnson.)

(Thereupon leg from defendant's prior device was received in evidence and marked Plaintiff's Exhibit No. 12.)

Mr. Mellin: Q. From Plaintiff's Exhibit 12 which you have in your hand, would you please show the Court and jury how it is adjusted for height, if you can?

A. The nut, which is this portion here, was turned on the threaded leg to adjust the height of the scaffold up and down. This is what is conventionally known in the trade as just a simple screw jack; a threaded leg and a nut inserted in the lower end of the tubular section. By turning the nut screws up and down on that threaded leg.

Q. Is that or is that not the only means of adjusting that threaded leg?

A. That is the only means of adjusting, is screwing the nut up and down on the threaded inner leg.

Q. You said a while ago, in connection with one of the scaffolds, that the leg would fall out when it went over a [54] hole or the scaffold was elevated too high. Could you show the jury and the Court what you meant by that?

A. Well, if this is the scaffold, that is what happens, it falls out (demonstrating).

Q. Prior to the time when you first observed the defendant putting out the adjustable legs of Exhibit 8 had you advertised the plaintiff's scaffold with legs such as in Exhibit 8?

A. Yes, we have advertised it extensively ever since we started in 1947.

(Testimony of Wallace J. S. Johnson.)

Q. Since '47? A. Yes, 1947.

Q. And would those advertisements or would they not teach you the fact of this leg adjustment?

A. Yes, we have featured the leg adjustment in our advertisements.

Q. Over what area was that advertising conducted and in what media?

A. In national trade magazines circulated throughout the United States and in many foreign countries.

Q. I show you what purports to be an advertisement in the American Painter and Decorator magazine of April 1951, and ask you if that is an advertisement of Up-Right, Inc. of this scaffold, Exhibit 8? A. Yes.

Q. And would you state whether or not that is typical of [55] the advertisements that you referred to? A. Yes.

Mr. Mellin: I will offer that in evidence, Your Honor, as next in order.

(Thereupon advertisement referred to above was received in evidence and marked Plaintiff's Exhibit No. 13.)

[See Book of Exhibits.]

Mr. Mellin: May I hand that to the jury, Your Honor?

The Court: Very well.

(Exhibit No. 13 was thereupon passed to the jury.)

Mr. Mellin: Q. Mr. Johnson, did Up-Right

(Testimony of Wallace J. S. Johnson.)

Scaffolding put out any brochures depicting the device of Exhibit 8?

A. Yes, we have had printed literature ever since we started manufacturing.

Q. And would you tell us whether or not in those brochures you illustrated this adjustable leg feature that is shown in the patent in suit?

A. Yes, it has been featured in all of our advertisements and leaflets.

Q. And since what time?

A. Since we started manufacturing in 1947.

Q. I hand you a brochure entitled "Up-Right Scaffolds" and ask you if that is typical of the manner in which that feature of the scaffold was depicted in your brochures over the period from 1947 to December of 1953? [56]

A. Yes, it is.

Mr. Mellin: May I offer that in evidence, Your Honor, as the next in order?

(Thereupon brochure identified above was received in evidence and marked Plaintiff's Exhibit No. 14.)

[See Book of Exhibits.]

Mr. Mellin: Q. Over what territory or to whom were brochures such as Exhibit 14 distributed?

A. They were distributed in all parts of the United States, in fact, every state in the Union.

Mr. Mellin: May I pass it to the jury?

(Thereupon Exhibit No. 14 was passed to the jury.)

Mr. Mellin: Q. Prior to the time that you ob-

(Testimony of Wallace J. S. Johnson.)

served that the defendant was using this adjustable leg feature shown in Exhibit 10, had you observed any of the defendant's advertisements with respect to the type of adjustable leg they were employing?

A. Yes.

Q. I hand you two tear pages, tear sheets, one of Industrial Equipment News and one of Contractor's Electrical Equipment, one of May 1950 and one of June 1950, and ask you if there appears thereon an advertisement of the defendant?

A. Yes, there does in each case.

Q. And can you tell from that advertisement the type of adjustable legs that were on those scaffolds? [57]

Mr. Bronson: I think the thing is the best evidence of its contents; it doesn't need explanation. We will object to asking the witness Johnson to interpret what is said.

The Court: I think your objection is good.

Mr. Mellin: Q. Does that show the Patent Scaffolding—

The Court: If you want to read it, you can read it.

Mr. Bronson: I would like to have him read it. It doesn't say anything about it.

Mr. Mellin: It depicts it in the illustration.

Mr. Bronson: There is a picture there. The jury can look at a picture just as well as Mr. Johnson, who is a party to this action.

The Court: There are pictures of scaffolds here, Mr. Mellin.

(Testimony of Wallace J. S. Johnson.)

Mr. Mellin: Yes, that is right.

The Court: They are not very clear. I don't know how you can tell from looking at them. Maybe you can.

Mr. Mellin: That is all right. Thank you, sir. May I offer those in evidence as the next in order?

(Thereupon tear sheets identified above were received in evidence and marked Plaintiff's Exhibit No. 15.)

[See Book of Exhibits.]

Mr. Bronson: I read them rapidly, Your Honor. Maybe counsel would concede that there isn't any reference or description of adjustments on those adjustable legs on those; [58] at least not with any particularity.

Mr. Mellin: I think one who is familiar with scaffolds can tell from the type of scaffold illustrated that there is an adjustment. I think that was proper, but he objected to it, so I am just putting them in so the jury can draw their own conclusions from looking at them.

The Court: All right; let them be admitted.

Mr. Mellin: Q. I hand you a brochure of the defendant, Mr. Johnson, which has a copyright date of 1950 and ask you if you obtained that about the date, some time during that year, or not?

A. Yes, we did.

Q. And does that illustrate the defendant's scaffold made about that time, to your knowledge?

A. Yes.

(Testimony of Wallace J. S. Johnson.)

Mr. Mellin: I offer that in evidence, Your Honor, as the next in order.

(Thereupon defendant's brochure identified above was received in evidence and marked Plaintiff's Exhibit No. 16.)

[See Book of Exhibits.]

Mr. Mellin: Q. I hand you a brochure of the Patent Scaffolding Company, bulletin ASF-1, which bears the copyright date 5/52, and ask you if you are familiar with the scaffold therein shown?

A. Yes, I am. [59]

Q. And does that illustrate Exhibit 10 as far as the adjustable leg feature is concerned?

A. Yes.

Q. When was it that you first saw a brochure or advertisement of the Patent Scaffolding Company illustrating or describing such a leg?

A. During the year 1952.

Q. And by the pamphlet you have in your hand or not?

A. That and others of the same vintage.

Mr. Mellin: May I offer that in evidence, Your Honor, as the next in order?

The Court: All right.

(Thereupon the brochure of the Patent Scaffolding Company referred to above was received in evidence and marked Plaintiff's Exhibit No. 17.)

[See Book of Exhibits.]

Mr. Mellin: May I hand these to the jury, Your Honor?

(Testimony of Wallace J. S. Johnson.)

(Thereupon exhibits were passed to the jury.)

Mr. Mellin: Q. When did you yourself first see a scaffold put out by the defendant that is comparable to Exhibit 10?

A. I believe it was in January of 1952 at the Plant Maintenance Show.

Q. Where was that?

A. I believe it was in Cleveland.

Q. Prior to that time at shows, fairs, or any other places [60] had you observed the defendant's portable scaffolding? A. Yes.

Q. And prior to that 1952 incident that you speak of, with what type of adjusting legs were the defendant's devices equipped?

A. Well, Mr. Mellin, for example on one particular occasion in September of 1950 I observed here in San Francisco the type of leg shown in this Exhibit No. 12.

Q. At any time were there any competitive demonstrations made between the Plaintiff's scaffolding and the Defendant's scaffolding?

A. Yes; for example, in the instance I mentioned in September of 1950 I was present at a comparative demonstration of Up-Right scaffolds and of Patent Scaffolding Company's scaffolds before the officials of the Department of Public Works of San Francisco.

Q. And what type of scaffold adjusting legs did the Up-Right scaffolds have?

A. Up-Right scaffold?

Q. Yes.

(Testimony of Wallace J. S. Johnson.)

A. It had the type shown in the patent drawing.

Q. In other words, Exhibit 8?

A. In Exhibit 8, yes.

Q. What type of adjusting legs did the defendant's device have? [61]

A. The defendant's device had this type of legs shown in Exhibit 12.

Q. During your experience in the mechanical engineering field and in the production field that you referred to, would you state whether or not you had any experience in connection with the licensing of patents?

A. Yes. In Autometric Machine Tool Company, for example, I was in charge of engineering, and that included the discussing and analyzing of license agreements, not only with one invention in which there was an actual license agreement, but others who came to us with devices they wished to put into manufacture.

Also at Joshua Hendy Iron Works when I was in charge of development of post-war products there, I negotiated a number of agreements with individual inventors. One was an oil well pump, another a rock crusher, and another was, let's say, a complete system for the generating of steam with a man named Benson. So in both of those cases I had experience in license agreements and arranged them.

Q. What importance, if any, would you place on the adjustable feature of this scaffold with respect

(Testimony of Wallace J. S. Johnson.)

to the salability and the usability of the scaffold Exhibit 8?

A. I would say that it is of prime importance because it is the feature that made the portable scaffold idea practical.

Q. From your knowledge of the scaffold art and from your [62] prior experience in connection with licensing, what would you say, in your opinion, would be a reasonable royalty for one to pay, for a manufacturer to pay for the use of this adjustable feature on a scaffold of this character?

A. Five per cent of the sales value of the scaffolds.

Q. When a scaffold includes more than one unit, that is, more than one of those sections, do you separately bid the section or do you bid the scaffold as the complete thing?

A. We manufacture, sell and bid scaffolds as complete entities themselves, not as parts.

Mr. Mellin: If Your Honor please, if we may have a five minute recess maybe Mr. Bronson and I could agree on a stipulation.

Mr. Bronson: You don't need to do that, if we might look at it.

(Discussion between counsel.)

Mr. Mellin: That will be all, from this witness. You may cross-examine.

Cross-Examination

Mr. Bronson: Q. I am referring you, Mr. Johnson, to your Exhibit 2, and I want to read a por-

(Testimony of Wallace J. S. Johnson.)

tion of it. That, to identify it to the Court and jury, is the agreement that you made with Up-Right Scaffolding Company dated January 5, 1948. It says: [63]

“This agreement made and entered into as of January 5, 1948 by and between Wallace J. S. Johnson of Berkeley, California, hereinafter referred to as Engineer, and Up-Right, Inc., a corporation authorized by and existing under the laws of the State of California, and having its principal place of business in the City of Berkeley,—”

and so forth.

“Witness:

“Whereas, Engineer Warrants that he is the inventor of the portable scaffold and scaffold mechanism described in patent applications to the U. S. Patent Office Serial No. 678,790, filed June 24, 1946, Portable and Collapsible Scaffolding Unit. Serial No. 774,036, filed September 15, 1947, Adjustable Supporting Leg. Serial No. 774,037, filed September 15, 1947, Stairway and Like Structure and Method of Fabricating the Same. Serial No. 774,038, filed September 15, 1947, Portable Scaffold Unit.”

I am not reading the rest, because I only intend to direct briefly your attention to that portion of the agreement. Each of those described applications for patents were then pending in the Patent Office in Washington, that is, on January 5, 1948, were they? [64] A. Yes.

(Testimony of Wallace J. S. Johnson.)

Q. Where I read after the date in each case the language "Portable and collapsible scaffolding unit" in the case of one application; "Adjustable supporting leg" in connection with another; "stairway and like structure and method of fabricating the same" for the third one; "portable scaffold unit" for the fourth one—those were all separate patents on the separate features of your scaffold, were they not?

A. They were separate applications, yes.

Q. And only one of them, to wit, the one I read as No. 774,036, filed September 15, '47, followed by the words "Adjustable supporting leg" refers to the patent that is in suit here; is that right?

A. Yes.

Q. So that to this Corporation by this agreement you transferred certain rights that we call in this case an exclusive license to the corporation; right?

A. Yes.

Q. And you gave them it for the life of the patent in each case that might be issued; is that right?

A. That is right.

Q. And you took as a sole consideration for the transfer of the patent that is in this suit and the four other applications for patents the amounts set forth in Paragraph 2 as follows: [65]

"Company agrees that effective January 1, 1948 it will pay Engineer a royalty of \$200 a month throughout the term of this agreement. This amount shall be paid not later than the 5th day of the month following each month end."

(Testimony of Wallace J. S. Johnson.)

That is right, is it not?

A. No, that isn't the sole reward.

Q. Well, it is the sole reward that is referred to in the agreement by which you transferred all of those conceptions whether they be inventions or not to this corporation? I will hand you the agreement; you can look at it and see if you can find any other consideration recited in there that went to you for those four patent applications.

A. There is no other consideration specifically referred to in this agreement.

Q. There are other stockholders in that company besides yourself?

A. Yes, there are a few other minor stockholders.

Q. You are a stockholder, are you?

A. I am the principal stockholder.

Q. You refer to serial number 774,036 as one of the—I will point to it there. How do you describe what you claimed was the invention at that time in that instance? What does it say there after 774,036?

A. "Filed September 15, 1947, Adjustable Supporting Leg." [66]

Q. You sued unsuccessfully this same defendant on that patent when it was issued, did you not?

Mr. Mellin: I object to that, Your Honor.

Mr. Bronson: We couldn't go into this further on the question of commercial success, so-called.

Mr. Mellin: "Sued unsuccessfully"—I am not so certain that is correct.

(Testimony of Wallace J. S. Johnson.)

Mr. Bronson: I will take out the word "unsuccessfully".

Q. You did sue this company that I defend here, the Patent Scaffolding Company, on one of these four rather than the one you are in suit on now, did you not?

A. Yes, but not the one that I had read, not the adjustable supporting leg; it was one of the others.

Q. I understand that. What is the one on there that you sued on before?

A. The one referred to as "portable and collapsible scaffolding unit."

Q. Do you recall how long ago you were in court on that suit? A. Three years ago.

Q. And didn't you claim commercial success then and the fact that that particular device then in suit, portable and collapsible scaffolding as it then existed without the adjustable leg was the basis of the commercial success?

A. I don't recall that we said that it was the sole basis for commercial success, no. [67]

Q. Do you state now to this Jury that the sole basis for commercial success of your entire scaffold as you now manufacture it is this leg?

A. I didn't state that; I stated that it was of prime importance in making the portable scaffold idea practical.

Q. You heard your Counsel address the Jury this morning in respect to the damages you claim here, basing it on the entire cost of the scaffolding

(Testimony of Wallace J. S. Johnson.)

as a basis for applying a royalty formula; is that right?

A. I think the record will show what he said, but to the best of my recollection, he mentioned that substantially as you have stated it.

Q. Mr. Johnson, when you testified here not five minutes ago about what you did down there at Hendy as a man negotiating with patentees on behalf of that Corporation, you then being their employee, you based that experience on a statement here that your royalty formula should be applied to the entire cost of the scaffolding, legs, platforms, ladders and all; is that right?

A. I don't believe I made a statement like that. I would say in explanation that in the case of a structure where the device under construction is an integral part of the device, the only practical arrangement for a royalty is upon the entire device itself, where as in the case of a device which is in commercial usage and otherwise easily disassociated from [68] the product, in that case the royalty can be upon the individual device itself.

Q. You don't mean that a painter can't work up there without your leg underneath him on this type of scaffold?

A. No, because it is a built-in, integral part of the scaffold; if it was left off he would fall down.

Q. You stated your age as forty-one. Do you remember the first time steel scaffolds were used on the outside of buildings or inside of buildings, demountable scaffolds?

(Testimony of Wallace J. S. Johnson.)

A. I have observed steel scaffolds in use all my adult life, yes.

Q. You filed the application back in Washington for this patent on what date, did you state?

A. I believe it was September 15, 1947, although the exhibit would show that date.

Q. Well, I have it here now. On the face of the application it shows the application was filed September 15, 1947; is that right?

A. That is correct.

Q. Will you tell the jurors how many claims of invention you made on that first application?

A. To the best of my recollection there were about eleven drawn up by our patent attorney.

Q. And all eleven of them were rejected; that is true, is it not? [69]

* * * * *

Mr. Bronson: Q. I wanted to straighten out one thing here, Mr. Johnson. Exhibit 16 I believe was passed to the Jury—Patent Scaffolding Company brochure your Counsel called it—that doesn't show, does it, in any of the drawings there the use of this type of leg?

Mr. Mellin: "This type", referring to which one?

Mr. Bronson: I pointed; I am sorry—to the patent [72] in suit and the type of leg represented by the patent in suit.

The Witness: This circular with the date on it of 8/50—1950—it says on here, does not show the type of leg in suit today, no.

Mr. Bronson: Q. You stated the date of your

(Testimony of Wallace J. S. Johnson.)

application for the patent in suit was in September 1947, and the Letters of Patent which have been put in evidence first by your Counsel show that the patent was issued slightly over five years later on November 18, 1952. You are not claiming here, if you can clarify this for me, that there was infringement by the defendant prior to the time you got the patent from the Patent Office?

Mr. Mellin: Your Honor, I object to that. Naturally there can be no infringement before the date the patent issued. That is a matter of law. There couldn't be. We showed that prior history to show that the patented device was on the market, they used and they continued to use it after the patent in suit was issued. We are claiming to recover only from the date of issuance of the patent—In fact, from the date of the first filing of the complaint. As a matter of law, there can't be any claim; we have no patent before that period.

Mr. Bronson: That is fine. We will accept that as a statement of your position and the question need not be answered. I didn't understand why you went into the two or [73] three years prior to the issuance of the patent.

Mr. Bronson: Q. Mr. Johnson, you know that the Government, as one customer for a rolling type of scaffolding, was specifying an adjustable leg of the kind represented by the patent in suit before you had any patent; isn't that true?

A. I don't understand whom you mean by "the Government"?

(Testimony of Wallace J. S. Johnson.)

Q. Any department of the Government—the Army, the Navy, or anybody concerned with construction particularly; well, in any field. Do you know that?

A. I am not sure I understand the question. I understand that the Government has various departments that are concerned with construction, yes.

Q. Let me ask you this: Have you ever sold to the Government? A. Yes.

Q. Have you sold to the Government scaffolding with this adjustable leg before the time that the letters of patent were issued? A. Yes.

Q. And do you know that those purchases were specifying a type of leg of this kind in their specifications and invitations for bids prior to the time that your patent was issued?

A. Yes, I do.

Q. And some of those bids were fulfilled or filled by your company and some by other companies; isn't that true?

A. I am familiar with the ones that we filled ourselves, yes. [74]

Q. You know that some of them you didn't get; they went to someone else; is that true?

A. During what period?

Q. Up to the time that your letters patent, but not beyond the time your letters patent were issued.

A. Yes, there were some that went to other vendors prior to the issuance of the patent.

Q. On the matter that I questioned you about

(Testimony of Wallace J. S. Johnson.)

before lunch, I will hand you this patent No. 2,438,173; I don't have the original, but a photostatic copy. This represents the W. J. S. Johnson Patent that was in suit some three years ago, on which you sued the same defendant as is here now; is that correct?

A. Will you repeat the question, please? It was rather long.

Q. Isn't that the patent that was in suit three years ago when you sued the Patent Scaffolding Company? A. Yes.

Q. And it does represent an aluminum scaffold?

A. Yes, portable scaffold.

Q. A portable scaffold, but without casters; right? A. Yes.

Q. It is portable by picking it up, lifting it, not by rolling it; is that correct?

A. That is right. [75]

Mr. Bronson: I will ask that that go in evidence. I don't propose at this time to hand it to the Jury.

Mr. Mellin: It is already in evidence.

Mr. Bronson: 2,438,173?

Mr. Mellin: Exhibit 5.

Mr. Bronson: I will withdraw that offer.

Mr. Bronson: Q. Mr. Johnson, I will hand you what purports to be an advertisement of Up-Right Scaffolding. I wish you would look at it and tell us if that is an ad placed by your Company in some trade journal?

A. Yes, this is an advertisement of our Company.

(Testimony of Wallace J. S. Johnson.)

Q. It bears the date down there, not on the ad, but the date November 1953. Were you placing ads of that kind or that particular one at that date?

A. 1953?

Q. Yes. A. Yes, that type of ad, yes.

Q. Do you recognize that as one that you placed in a trade journal in the latter part of 1953?

A. I don't remember the exact time, but, yes, that is our ad.

Mr. Bronson: I will ask that this be admitted, Your Honor.

(Whereupon advertisement dated November 1953, referred to and described above, was received [76] in evidence and marked Defendant's Exhibit A.)

Mr. Bronson: To save the time of passing this to the Jury, I want to read it, Your Honor. I can't read the pictures, Your Honor, but I can read the printed part, which I will do now.

It shows a figure of a magician with a wand and it says:

"Presto * * * it's up!"

Then:

"25 feet. 'Up-Right'. Scaffold-on-wheels set up in only five minutes! As if by magic, an aluminum alloy tower of height desired is ready in minutes! Individual scaffold sections are set one on top of the other. Sections lock into place instantly. The tower rolls down aisles—straddles machinery.

"Here's the secret! Patented one-piece sec-

(Testimony of Wallace J. S. Johnson.)

tions. Each one-piece section is unfolded by one man in less than a minute! No tools, winged nuts or bolts.

“Your maintenance costs can be reduced by ‘Up-Right Scaffolds.’ Offices in all principal cities. Write for descriptive circular. ‘Up-Right Scaffolds.’”

with an address on Pardee Street, Berkeley, and the expression:

“Factories: Berkeley, California and Teterboro, New Jersey.” [77]

Mr. Bronson: Q. Do you have a hand in writing up these ads? A. Yes.

Q. When you wrote this one up and spoke of the one-piece sections, you were at that time manufacturing this collapsable leg, weren't you, or extensible leg?

A. We were at that time manufacturing the adjustable leg under suit here.

Q. Now I may have misunderstood your testimony on the direct examination conducted by your Counsel, Mr. Johnson, but do I understand you to say that this leg of yours—I don't mean your leg, but the leg of the scaffold—that that cannot fall out; that is to say, the inner member cannot fall out of the tubular member?

A. As long as the nut is held in place by the collar the leg cannot fall out.

Q. Well, if I release that it does fall down, no question about that (demonstrating)?

A. That is right.

(Testimony of Wallace J. S. Johnson.)

Q. You are not claiming for the device anything that will prevent the falling out of the inner member with the relaxation of the clutch device; that is, the sliding out of the collar to the point where the fingers are extended outward?

A. When the collar is raised and the nut expands, the leg seeks its own level and provides the very coarse adjustment feature, which is what we were achieving when I invented it. [78] Another way of saying it falls, just like you demonstrated.

Q. I want to clear that up. You are not contending that you have got any device whereby once you release that collar this inner portion may not drop out of the outer portion?

A. We are specifically contending that when you do raise the collar and the nut opens, that falling action is the coarse adjustment built into the mechanism. In that sense it does fall, yes, but only in that sense.

Q. One other point I would like to bring out before going further. You stated that the collar remains in place despite the fact that the scaffold may be rolled around over uneven surfaces because the threaded nut at the bottom on the outer shaft is exactly cylindrical, not tapered, and that the collar itself is exactly cylindrical, and not tapered; is that correct?

A. That is correct, in the sense that when the collar is surrounding the nut, the nut is held in a cylindrical relationship within the cylindrical collar, yes.

(Testimony of Wallace J. S. Johnson.)

Q. Yes. All right. Your answer then is "yes" and you stated, to go further with it, that gravity kept it down, is that right?

In other words, the force of gravity that goes toward the center of the earth holds down this collar on the outer shaft when it is locked because there are perfectly perpendicular surfaces to both the collar and the outer shaft? [79]

A. Yes, gravity pulls down on the collar, yes.

Q. What is this little thing here?

A. That is the gliding latch.

Q. That is the gliding latch. I will carry it down here. The part that you refer to is a portion of the tube that is cut on two sides from the end and raised slightly so that when it is not depressed, it holds the collar from moving back up; is that right?

A. Yes, that's right.

Q. And if you want to move the collar back up, you depress that and you can force the collar forward with your hand manually past that lock; correct? A. Past that latch, yes.

Q. Yes. I will come down here to this little point here. (Indicating) That is the latch that he speaks of that you depress manually and pull the collar up over that roller end so that you can get your rough adjustment, as you call it, or your rapid adjustment; correct?

A. I am not sure I understand the question, but——

Q. Let's not go further with it now. Let me ask you, on this drawing your Counsel introduced as an

(Testimony of Wallace J. S. Johnson.)

enlargement of the drawing submitted to the patent office, do you find that on there at all?

A. What? The latch?

Q. The latch. [80]

A. No, the latch isn't there on that drawing or we are not concerned with it in this suit, to the best of my knowledge.

Q. In any event, what you contend was an invention of yours was one without this latch, sir; correct?

A. Correct.

Q. It was added afterward, wasn't it?

A. Oh, yes.

Q. You had a number of accidents from the collapsing of these devices, **did you not, when this thing would slip up without a latch to hold it there?**

A. Not to my knowledge.

Q. Are you serious about that?

A. I don't understand your question.

Q. You have had your device, your leg as represented on the patent without that latch, collapse and injure people, have you not, and you have had some claims that were made and defended by your insurance company?

A. For a matter of the record, there has been no case in which the construction or design of a scaffold has been found in any lawsuit whatsoever to be at fault. In the only case that ever came to trial the case against us was dismissed because it was proved to be workman error.

Q. It was settled, wasn't it, for many thousand dollars? Wasn't that the St. Paul Mercury case?

(Testimony of Wallace J. S. Johnson.)

A. I am referring to the Sunset Rubber Company vs. Up-Right Scaffold.

Q. I am talking about the one where you had a collapse and did settle on the basis that you had an unsafe condition about that latch.

A. We as a manufacturer and the ones that broke the scaffold have never acknowledged to anyone, nor have the courts ever decided that we were at fault. We have never acknowledged any accident as a fault of design or construction of the scaffold. Now if there was an insurance company who in some case decided they would throw something out of court, that was entirely the decision of the insurance company and not ourselves.

Q. You are like the man who goes down the road through a red light and says "It still wasn't my fault," Mr. Johnson.

A. I don't understand the pertinency of the question.

Q. I don't expect you to admit the fault, but you do know, do you not, a substantial money settlement was made in that case on account of the thing that I mentioned there to you?

A. It was my desire to defend that suit because I felt that we had substantial evidence to show that it was workman error that caused that accident. It was the independent decision on the part of the insurance company, for reasons I don't know, to settle it out of court.

Q. I see. Thank you very much. [82]

You are familiar with the claims of the patent in

(Testimony of Wallace J. S. Johnson.)

suit number 2,618,496 that are contained at the close of the letters?

A. I am familiar with the claim, yes. There is one.

Q. There is one. You are also familiar with the fact that it is made up of four separate elements by its terms, is that not true?

A. Well, I haven't thought of it as being made up of elements, but I am thoroughly familiar with the claim.

Q. Let's read it. We will read it preliminary to some questions I want to ask you. I am eliminating, if the Court please and members of the jury, the opening portion regarding the explanation of the device and its objects. Beginning on line 18 in column 4:

"Having thus described my invention, what I claim and desire to secure by Letters Patent is:

"A scaffold supporting leg comprising a vertical tubular outer supporting leg member terminating at its lower end in a plurality of downwardly extending outwardly radially biased resilient fingers integral therewith,"——

that is the first portion, and I am going to stop there.

Now to indicate the portion that I have just read, what I have called the first element of your claim, take this in your hand, please. What is this "a scaffold supporting leg comprising a vertical tubular outer supporting leg member," [83] you have in

(Testimony of Wallace J. S. Johnson.)

your hands, do you not, a cut-off piece of the tubular outer supporting leg member, have you not? A. Yes.

Q. Going on: "terminating at its lower end in a plurality of downward extending outwardly radially biased resilient fingers integral therewith." That is kind of a mouthful, but what it means, Mr. Johnson, the second portion of it I will say, is the portion here that is slotted and has the outwardly radiating fingers; is that correct?

A. That is right.

Q. In my rough lawyer's language; I am not an engineer. So now we will go to the next portion, and this I will call the second element of your claim:

"* * * an inner member telescopically received within the outer member, said inner member having an upper cylindrical bearing portion engaging a complementary portion of said outer supporting leg member and having an externally threaded lower portion,"——

leaving out the wheel and all.

That is the portion of the other part of the device here Exhibit 7, is it not?

A. The portion you have in your hand is the inner leg with the cylindrical portion above and the threaded portion below, as you have read in the patent claim, yes.

Q. Now, we come to what I will call the third claim. All of [84] these things follow one upon the other with never more than a comma:

(Testimony of Wallace J. S. Johnson.)

“* * * a segmental internally threaded nut fixedly secured to said fingers for threaded engagement with the threaded portion of the inner member when the fingers are forced inwardly,”——

what is that?

A. That is this nut which is a part of the tube.

Q. And the internal threads are here?

A. That is right.

Q. And the last element, as I will call it, the collar—where is the collar again?

A. That is this member which slides up and down on the tube when you move it.

Q. I will read it so that we have the complete claim read to the jury:

“* * * and a collar on the outer member movable relative to the nut to force the fingers inwardly to place the nut into threaded engagement with the threads of the inner member and to retain such engagement until the collar is moved relative to the nut to permit the fingers to move outwardly, the length of the threaded portion on the inner member being substantially greater than the length of the threaded portion of the nut.” [85]

This is the collar, is it not, that you move upward or downward to release or to clutch this outer tube against the inner member; correct?

A. That is right.

Q. And the comparison of the length of the threaded members refers to this comparatively

(Testimony of Wallace J. S. Johnson.)

small threaded portion on the outer member with the long threaded portion on the inner; is that correct? A. Correct.

Q. Let me ask you, Mr. Johnson, do you claim to be the inventor of the portion of the device where two members cooperate, telescopically?

Mr. Mellin: Just a moment, Your Honor. I object to this; he only claims to be the inventor of what is stated in the patent in suit; nothing else. This is immaterial and irrelevant.

Mr. Bronson: I want to find out if there is any part of this that is integral with the device——

The Court: Of course that goes to the other question of validity of the patent and I haven't read it yet, but I suppose this is on the theory of combination of elements; is that right?

Mr. Bronson: That is exactly right, Your Honor. and we are going through, and I am confident that Mr. Johnson will have something to tell me about his claims here that will be important to the case and important to the jury in deciding [86] it, and to Your Honor, too.

Mr. Mellin: I still object, Your Honor. He is the inventor only of what is claimed in that combination.

The Court: That is what he claims.

Mr. Mellin: That is what he claims, and that is all that is before the Court.

The Court: If on its face it is a combination and it doesn't meet the legal standards, then it hasn't got validity; if it does meet the standards it has validity. I don't think what this witness has to

(Testimony of Wallace J. S. Johnson.)

say about it makes any difference one way or the other, any more than any witness who takes the stand and says "I think I am right about my case." He doesn't decide it. That is what he is here for, and that is practically the whole problem in any patent suit.

Mr. Bronson: I might call Your Honor's attention to this: this gentleman is at least the so-called inventor and he is also an expert and qualified as such.

The Court: I don't think he has given any expert testimony.

Mr. Mellin: He has given no expert testimony whatever.

The Court: He has described the patent.

Mr. Bronson: He was questioned and qualified, Your Honor, as I understood it, as an expert, when they went through at some length his qualifications in this field in order to explain the device. [87]

* * * * *

Q. Mr. Johnson, let me ask you this: Do you contend that your patent here in suit was the first device that constituted a portable scaffold?

A. I contend that this is my—the patent did issue to me on an adjustable supporting leg for a scaffold.

Q. Yes, but not the first portable scaffold?

A. No, not the complete scaffold, no.

Q. Not the first scaffold on rollers or casters?

A. No, I don't contend that this is the first. [92]

Q. You are familiar, are you not, with the pa-

(Testimony of Wallace J. S. Johnson.)

tents cited by the Patent Office of prior art in connection with the issuance of your patent?

A. Yes.

Q. You are familiar with the Uecker Patent that is cited there? A. Yes.

Q. And you are familiar with the Prowd patent, are you not? A. Yes.

* * * * *

Redirect Examination

Mr. Mellin: Q. Mr. Johnson, counsel asked you if you are familiar with the Uecker Patent which was cited by the Patent Office? A. Yes.

Q. Do you recall that? A. Yes. [93]

Q. I hand you Exhibit 4, and in referring to that Uecker Patent that he refers to, I will ask you if that is a quick adjustable leg for a scaffold in the sense of the device of the patent in suit?

A. No.

Q. Would you compare the showing of the Uecker Patent with the former leg of the defendant, the one which they used before the infringing device, and that is Exhibit 12, and describe the differences, if any, between the adjustable leg of the Uecker Patent and that in Exhibit 12? Do you have the patent? A. Yes.

Q. What number is it, please?

A. Number 2,043,498. In Figure 6 of this patent it shows a screw jack type leg substantially like Exhibit 12.

Q. And its mode of operation is it different or similar to Exhibit 12?

(Testimony of Wallace J. S. Johnson.)

A. It is similar in its mode of operation.

Q. Does it have a mode of operation similar or different from that of the device in the patent in suit?

A. It has a different mode of operation than the device under question.

Q. Would you turn to the Prowd patent that counsel also referred to? Do you have it?

A. Yes, I have that before me. [94]

Q. Would you state whether or not that is an adjustable leg for a scaffold?

A. No, this is a patent on a pipe coupling.

Q. And would you state whether or not, without changes, it could be made into an adjustable leg for a scaffold?

A. No, *I* couldn't be made into an adjustable leg for a scaffold; it would be inoperable.

Q. Thank you, Mr. Johnson. Now with respect to the patent on a scaffold unit that was shown in patent Exhibit 5, do you still make that type of scaffold unit?

A. The type of scaffold unit shown in Exhibit 5, copy of the patent, is a stairway type scaffold. That we still manufacture, yes.

Q. Is that the type of scaffold shown in this advertisement, Defendant's Exhibit A, which counsel handed you?

A. Yes, it is the same scaffold.

Q. Besides that particular type of scaffold unit, what other type of scaffold do you make?

(Testimony of Wallace J. S. Johnson.)

A. Portable scaffolds, the type you see here in the court room, Exhibit 8, I believe it is.

Q. This isn't the type shown in the advertisement, is it?

A. No. We make several types of scaffold. This in the court room, Exhibit 8, is known as the span type scaffold, which we make in either 6, 8, or 10-foot lengths. The type shown in—what exhibit is that? [95]

Q. "A."

A. "A" is a stairway type scaffold.

Q. And you make other types in addition?

A. Yes; for example, a high-clearance scaffold; a 6-foot span scaffold.

The Court: Q. Some of these scaffolds haven't got the adjustable legs?

The Witness: All of the scaffolds we manufacture in our commercial line have the same rollers and adjustable legs.

The Court: The one that is in this advertisement has the adjustable legs, has it?

The Witness: Yes, it does.

Mr. Mellin: Q. Have you ever commercially manufactured any portable scaffolds without the adjustable leg which is here in issue that you know of?

A. Well, I will have to qualify my answer, because occasionally we are asked to bid on a special scaffold, usually known as a work stand for rolling on perfectly level floors, for example in aircraft factories, and occasionally we do build such

(Testimony of Wallace J. S. Johnson.)

scaffolds without the adjustable legs, but they are not a part of our commercial line of scaffolds, and I should say at least 95 per cent of our production of scaffolds is with the same adjustable legs we have under discussion here.

Q. Over what period of time, Mr. Johnson?

A. Ever since the first scaffold was shipped in February [96] of '47 until the present.

Q. What other companies are in competition with the Up-Right, Inc. as far as your own knowledge is concerned with reference to this portable aluminum scaffold with its adjustable legs?

A. Only one company, to my knowledge.

Q. What is that?

A. Patent Scaffolding Company.

Q. You referred to filling Government orders; was it the Patent Scaffolding Company or some other company?

A. It was the Patent Scaffolding Company.

Q. You spoke of an incident where you saw one of their adjustable legs on a scaffold, I think you said in January of 1951, or January of '52; do you recall it?

A. Yes, at a plant maintenance show.

Q. Do you recall another instance of a Patent Scaffolding being sold to the Palace of the Legion of Honor here in San Francisco?

A. Yes, but that I believe was a bid on which we quoted in November of 1952.

Q. And what type of leg was furnished by Patent Scaffolding Company, if you know?

(Testimony of Wallace J. S. Johnson.)

Mr. Bronson: Isn't this before the issuance of your patent—before the filing of your suit, rather?

The Witness: The bid was in November.

Mr. Mellin: Just a moment, Mr. Johnson. Excuse me, Mr. [97] Johnson. If Your Honor please, we are showing direct copying here, the fact that it was copied.

Mr. Bronson: At that time you didn't have a patent.

Mr. Mellin: It was copied before the patent issued, and the copying is there to show the basis for asking the Court perhaps, for an increase in damages because of the deliberate character of the infringement. The copying was effected before the patent in suit, and they continued the copying after the patent in suit, which doesn't make it any less deliberate, and the inference that Mr. Bronson gave is that Patent Scaffolding Company sold them to the United States Government, filled orders before that time, when actually that isn't the question. He asked about it, so I am clearing it up.

The Court: I don't think he asked that——

Mr. Mellin: Oh, yes.

The Court: ——for the purpose of showing that it was only the United States Government.

Mr. Mellin: That is what he asked, and he asked before the patent issued.

The Court: I will overrule the objection.

The Witness: Could you repeat the question, please?

(Testimony of Wallace J. S. Johnson.)

The Court: He asked you about an incident at the Palace of Fine Arts.

The Witness: The bid was requested in November, but the Patent Scaffolding Company made delivery in January. [98]

Mr. Mellin: Q. What type of scaffold was it?

A. It was——

Q. I mean as far as the legs were concerned.

A. It had legs on it of the type in Exhibit 10, I believe, it is.

Mr. Mellin: That is all.

* * * * *

Recross-Examination

Mr. Bronson: Q. Did you say that the Uecker Patent referred in the file wrapper was the same as Exhibit 12, one that would fall apart here?

A. I said that it operated in a similar manner.

Q. Take a look at this enlarged picture when I hold it up here. That Uecker Patent which came about in 1934, twenty years ago, for a scaffold had a screw member, the inner member and the outer one locked by screw threads, and it couldn't fall out, isn't that right, Mr. Johnson, and it is not the same as Exhibit 12 that you were at pains to have fall apart here when you demonstrated it for the jury?

A. Would you excuse me. I am not sure I understand exactly what the question is. I thought it was a statement. Will [99] you repeat it?

Mr. Bronson: Have the Reporter read it. If that

(Testimony of Wallace J. S. Johnson.)

is a rebuke I may have to accept it, Mr. Witness; I am sorry. But I will restate the question.

Q. Is it not a fact—and I will hold this up here once more for you—that that Uecker patent has an internally and externally threaded arrangement between the inner and outer members so that it cannot fall out?

A. The inner member has no unthreaded portion on the end of it and therefore the device could be so adjusted that the inner leg would fall out of the outer leg.

Q. How was that going to happen when you have got it screwed in there?

A. Simply by unscrewing the inner screw out of the——

Q. The same as you do on your own invention when you pull the collar out?

A. Those are two different functions and are not comparable. I am referring to the fact that this device has an unthreaded portion on the inner thread of the leg preventing its falling out if you screw the device to the extremity of the threaded portion.

Q. Mr. Johnson, on Exhibit 12 with which you compared the Uecker Patent there is no threaded portion to hold the outer member together with the inner member and prevent the falling out of the inner member, is there, in Exhibit 12? [100]

A. There is no threaded portion on the outer tube, no.

Q. That isn't true of the Uecker Patent, is it?

(Testimony of Wallace J. S. Johnson.)

A. From the drawing I can't say. I don't think the drawing shows whether or not there is a thread between the nut and the outer member or not.

* * * * *

The Court: There is no use *giving*, into these colloquies. Don't pay any attention to the lawyers' arguments.

Mr. Bronson: Q. Will you look at the Prowd invention that is pictured there? Are you familiar with that from an examination of the file wrapper on the patent in suit?

A. I am familiar with that drawing, yes.

Q. You have a color there that is in green, have you not? A. Yes.

Q. That is slidable against the parts of the outer member that are threaded internally and bring them into contact with [101] the other portion, the inner member, and lock them?

A. Which member are you referring to?

Q. I am referring to several; first, this collar in green which is in one position here.

A. Yes, Number 17.

Q. Here is Number 17 in a locked position. Now, we will take the yellow portion which has parts that are not integral of the outer member that are brought together by sliding a collar down and engaging the inner threading of the outer member with the outer threading of the inner member just as yours does; isn't that right?

A. The collar brings those segments together, but it does not do it in the same manner as to the

(Testimony of Wallace J. S. Johnson.)

function of the device that the patented article under suit does.

Q. Yours has this addition that the blue portion ends up against there and this slides telescopically inside of the other member; is that correct?

A. That is one of the differences, yes.

Mr. Bronson: That is all at this time, Your Honor.

I am not offering these at this time, Your Honor.

The Court: You better mark them or identify them in some way so the record will show what you referred to.

Mr. Bronson: Yes. The first is the drawing from the York Patent.

(The drawing referred to was thereupon marked [102] Defendant's Exhibit B for identification.)

Mr. Bronson: The second is from the Prowd patent.

(Thereupon the drawing referred to above was marked Defendant's Exhibit C for identification.) [103]

* * * * *

Further Redirect Examination

Mr. Mellin: Q. Mr. Johnson, at the close of yesterday's session, Counsel for defendant showed you an enlargement of the Eucker Patent, 2,043,498 and insisted that there was a threaded connection between the sleeve in the leg and the screw threaded leg. Have you examined that patent since yesterday?

A. Yes, I have.

(Testimony of Wallace J. S. Johnson.)

Q. Do you find any such screw threaded connection?

A. There is no screw threaded connection between the sleeve and the outer scaffold leg.

Q. Referring to Exhibit 12 as far as the connection of the sleeve with the leg is concerned, how does the disclosure of Eucker patent compare with Exhibit 12?

A. The sleeve in the Eucker Patent goes into the leg in exactly [104] the same manner that this sleeve does, with the exception that in the Eucker patent the sleeve is held in with a bolt going across through the tube.

Q. And the leg itself is threaded, is it, Mr. Johnson?

A. Oh, yes, the inner adjusting screw thread is a thread.

Q. And like or unlike that that you have in your hand?

A. Yes, the same.

Q. What adjustment is the leg of the Eucker Patent capable of making?

A. The adjustment of the Eucker leg is the same as the adjustment of this leg shown in Exhibit 12, the only difference being that in this leg of Exhibit 12 the nut is turned on the screw, whereas in the Eucker Patent, the screw is turned within the nut, but they are both a combination of a sliding nut and a screw.

Q. In other words, the sleeve in the Eucker Patent and also in Exhibit 12 are sleeves merely into the leg; is that correct?

(Testimony of Wallace J. S. Johnson.)

A. That is correct.

Q. Is the device in the Eucker Patent capable of functioning in the fashion that you demonstrated the patented leg in Exhibit 8? A. No.

Q. Is it capable of producing or not the quick adjustment that you described?

A. It is incapable of producing the quick adjustment. [105]

Q. Counsel also called your attention to the Prowd Patent, Defendant's Exhibit C for Identification. Do you recall that?

A. Yes, I recall that.

Q. What is that device?

A. That is a pipe coupling.

Q. And is it capable, as it is constructed in the patent, of performing the functions of an adjustable scaffold leg? A. Absolutely not.

Q. Does it operate in the fashion or not of the leg of the patent in suit? A. No.

Mr. Mellin: And I have been referring to Patent No. 2,388,179. That is all.

Just a moment, Mr. Johnson.

Mr. Mellin: Q. Over the period of time, how many scaffolds has Up-right, Inc., manufactured which included the instantly adjustable leg that is disclosed in the patent in suit?

A. To what period exactly do you refer?

Q. To the period whenever you made the legs?

A. From February 28, 1947 until the present time?

Q. That is correct.

(Testimony of Wallace J. S. Johnson.)

A. Up until February of this year—to February of this year or last year? [106]

Q. 1953; pardon me.

A. Let's see; from February 28, '47 to February 15, '53, we have manufactured between 19 and 20 thousand.

Q. Scaffolds?

A. Scaffolds employing these adjustable legs.

Q. How did you arrive at these figures?

A. We arrive at that figure by adding up the number of adjustable legs, four of which go to each scaffold we have manufactured, and there are approximately 79,500 of such legs.

Q. That you have manufactured during that period and sold? A. Yes, that's right.

Mr. Mellin: That is all.

* * * * *

VICTOR W. MENG

was called as a witness on behalf of the plaintiff herein, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as hereinafter indicated:

The Clerk: Please state your name to the Court and to the [107] Jury.

The Witness: Victor W. Meng.

Direct Examination

Mr. Mellin: Q. Where is your residence, Mr. Meng?

A. 257 Stewart Avenue, Garden City, New York.

Q. And what is your occupation?

(Testimony of Victor W. Meng.)

A. I am President of the Patent Scaffolding Company.

Q. And how long have you been associated with the Patent Scaffolding Company?

A. Approximately 38 years.

Q. And during that time they have been engaged in the manufacture of scaffolding of various types?

A. Yes, sir.

Q. As I understand it, it is one of the older and larger of all the scaffold companies in the Country, is that correct?

Mr. Bronson: I object to that as incompetent, irrelevant and immaterial.

Mr. Mellin: I will withdraw it, Your Honor.

Mr. Mellin: Q. Mr. Meng, you heard your Counsel yesterday state that these instantly adjustable legs that we have been speaking of that are shown in the patent in suit were called for on various bids for scaffolding; is that correct?

A. Yes, sir.

Q. And if you had not supplied that particular leg on those [108] bids, you would not have been successful in obtaining the bids; that is right?

A. That is correct.

Mr. Mellin: If the Court please, there were certain interrogatories filed in this case looking to the number of scaffolds manufactured and sold by the Patent Scaffolding Company during the period for which we contend damages, which, to wit: December 12th of 1952 to February 25th of 1953.

(Testimony of Victor W. Meng.)

The Court: I am not quite clear. What is the period?

Mr. Mellin: The period from December 18th of 1952 to February 25, 1953. That is the interim between the filing of the original Complaint, Your Honor, and the filing of the Amended Complaint. And we have recapitulated those into the number of scaffolds and the total sales price of those scaffolds which had the patented leg, and we have arrived at the figure of \$18,309.20. I understand that Counsel is willing to stipulate that the recapitulation that I have is true, correct and accurate, but it will, however, be subject to any correction if any error is found.

Mr. Bronson: That is right, but I add this: that the number of scaffolds sold in that interval of time that you mentioned is 61 scaffolds.

Mr. Mellin: That is correct. That is on the recapitulation.

Mr. Bronson: And also say that the stipulation will [109] follow exactly the terms of the answer that Mr. Meng gave to the interrogatories Counsel mentioned, and that figure of \$18,309 represents the total gross sales price of the entire scaffold involved.

* * * * *

(Whereupon recap referred to and heretofore more particularly described was received in evidence and marked Plaintiff's Exhibit 18.)

Mr. Mellin: That is all, Mr. Meng.

The Plaintiff rests, Your Honor.

Plaintiff Rests.

Mr. Bronson: At this time, if the Court please, on the law side of this case, I will reserve a motion for a directed verdict and not make it at this time, it being understood that it will be debated and pursued more at length at the close of the case.

The Court: Very well. [110]

* * * * *

Mr. Bronson: I have supplied some enlarged drawings of [113] the patents. Suppose you wait while I go through some other matters.

I now offer in evidence, if the Court please, preliminary to the testimony, explanatory of prior art, the following:

As our next Exhibit the soft copy from the Patent Office of Patent No. 1,679,017, July 31, 1938, issued to J. M. Athans.

(Thereupon the Patent above referred to was received in evidence and marked Defendant's Exhibit D.)

[See Book of Exhibits.]

Mr. Bronson: Next, if the Court please, a patent to R. A. Eucker, No. 2,203,114, granted June 4, 1940. And I might say in passing that is to be distinguished from another Eucker Patent which is already referred in evidence as Defendant's Exhibit B, which is a patent granted four years earlier, June 9, 1936.

(Thereupon the Patent above referred to was received in evidence and marked Defendant's Exhibit E.)

[See Book of Exhibits.]

Mr. Bronson: A patent granted to G. A. Countryman, No. 1,912,475, June 6, 1933.

(Thereupon the Patent above referred to was received in evidence and marked Defendant's Exhibit F.)

[See Book of Exhibits.]

Mr. Bronson: Letters to M. Taylor, No. 747,270, granted on December 15, 1903. [114]

(Whereupon patent heretofore referred to was received in evidence and marked Defendant's Exhibit G.)

[See Book of Exhibits.]

Mr. Bronson: Letters to J. Burns, 1,181,734, on May 2, 1916.

(Whereupon Patent above referred to was received in evidence and marked Defendant's Exhibit H.)

[See Book of Exhibits.]

Mr. Bronson: Letters granted to J. Stevens and others, No. 351,474, Patented October 26, 1886.

(Whereupon Patent above referred to was received in evidence and marked Defendant's Exhibit I.)

[See Book of Exhibits.]

Mr. Bronson: Next is the Hinckley—— [115]

* * * * *

I offer next Letters Patent to G. A. Hinckley No. 135,988, issued February 18, 1873.

(Thereupon Patent above referred to was received in evidence and marked Defendant's Exhibit J.)

[See Book of Exhibits.]

Mr. Bronson: J. S. Birch, Patent No. 210,235, issued November 26, 1878.

(Thereupon Patent above referred to was received in evidence and marked Defendant's Exhibit K.)

[See Book of Exhibits.]

Mr. Bronson: Patent issued to E. Michelin, No. 750,675, issued on January 26, 1904.

(Thereupon Patent above referred to was received in evidence and marked Defendant's Exhibit L.)

[See Book of Exhibits.]

Mr. Bronson: Next is C. T. Mapes, No. 845,152, patented May 21, 1907.

(Thereupon Patent above referred to was received in evidence and marked Defendant's Exhibit M.)

[See Book of Exhibits.]

Mr. Bronson: And finally Letters to F. Moore, No. 2,184,358.

(Thereupon Patent above referred to was received in evidence and marked Defendant's Exhibit N.) [116] * * * * *

[See Book of Exhibits.]

GEORGE B. WHITE

was called as a witness on behalf of the defendant herein, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as hereinafter indicated.

The Court: Will you state your name to the Court and to the Jury?

(Testimony of George B. White.)

The Witness: My name is George B. White.

Direct Examination

Mr. Bronson: Q. Where do you live, Mr. White?

A. I reside at 2965 Nineteenth Avenue, San Francisco, California. [117]

Q. And what occupation do you follow?

A. I am a patent attorney and an attorney-at-law.

Q. Will you state to the Court and Jury what technical training and background you have? I am asking you to just go through those letters please, briefly.

A. I had three years of engineering at Budapest, Hungary, graduating as a mechanical engineer. I took a graduate course at the Northwestern University, Boston, Massachusetts in automative engineering. I worked for the General Electric Company Lynn, Massachusetts, and for B. F. Sturtevant at Hyde Park, Massachusetts as a designing engineer. I worked for the Denver Rock Drill Company at Denver, Colorado as tool designer; for the Pacific Electric Manufacturing Company at San Francisco, California as designing engineer; and worked as patent draftsman, and at that time I consulted and designed various inventions for inventors.

In 1928 I was registered as a patent attorney, and in 1933 I received a Master of Law Degree at the University of San Francisco. Since 1931 I have had my own office and prosecuted a large number of patent applications before the patent office.

(Testimony of George B. White.)

Q. You had prepared and prosecuted patent office applications, have you?

A. Yes, hundreds of them.

Q. That is part of your professional activity?

A. Almost entirely.

Q. Almost entirely. Now, Mr. White, have you examined the file wrapper in the case in suit?

Mr. Mellin: If the Court please, may I examine as to his qualifications to testify as an expert?

Mr. Bronson: We do not expect to use him in the technical sense as an expert at all, Your Honor. I might say—I don't want to interrupt you—

Mr. Mellin: That is all right.

Mr. Bronson: —but Mr. White is here to explain things that would take the jurors days and days if they went through the documents that I handed to Your Honor. The pictures are here, they only require an explanation; and as I understand it, he won't be asked to testify as an expert except insofar as he can read a patent and look at the picture and see what it means.

Mr. Mellin: What I want to be sure—I want the Jury to understand thoroughly what these prior arts devices are, Your Honor; but where we have a patent lawyer who normally practices before this Court as a patent lawyer. He has been seated at the Counsel Table with Mr. Bronson. I want to know in what capacity he is here, whether he is here as an attorney or as a witness. I would like to ask the witness that.

Mr. Bronson: You go ahead and ask him.

(Testimony of George B. White.)

Mr. Mellin: I would also like to ask his qualifications [119] insofar as scaffolding is concerned.

Mr. Bronson: Is this in the nature of voir dire, do I understand, Your Honor?

Mr. Mellin: Yes.

The Court: Yes.

Voir dire Examination

Mr. Mellin: Q. What experience, practical experience, if any, have you had in scaffolding?

A. I studied structures and beams in connection with my course in mechanical engineering. In 1923 I took a University Extension course from the University of Wisconsin particularly on beam structures and stresses.

Q. But not scaffolding particularly?

A. Well, it involved bridges, beams and other supporting structures. I designed several devices for supporting structures, but not specifically scaffolding. I do not believe that the problem of scaffolding is different from any other stresses in structures under which tubes are used to support structures, but I never designed specifically any scaffold in my life.

Q. Would you answer my question now, Mr. White: What practical experience have you had with scaffolding, if any?

A. None, except I stood on it, I examined it and took them apart and put them together. [120]

Q. Then that was in preparation for this case?

A. Well, no, I observed scaffolding before; I

(Testimony of George B. White.)

saw them on the street as everybody else does.

Q. What scaffolding did you see on the streets?

A. Well, I saw the usual scaffolding which was in front of buildings on Montgomery.

Q. Did you ever see any scaffolding like Exhibit 8 before you commenced to prepare for this trial?

A. In what respect?

Q. In respect to the legs? A. No.

Q. In other words, then, the first time you saw scaffolding of this character, Exhibit 8, was when you were called in to prepare for your testimony in this trial?

A. The first time I observed that was then.

Q. And you of course are being paid your usual fees to appear here? A. Yes, sir.

Q. Are you in a single capacity as a witness or a double capacity of a counsel and witness?

A. I was not called into this case until it was far along,—I believe it was sometime last December—and I was not advised of the pleadings or state of the pleadings and I didn't even read the pleadings, and I was not consulted on any of the phases involved in the usual legal procedure leading up to trial, except to prepare an opinion, complete a search on the scaffolding art, and to give an opinion as to the prior art.

Q. Is that what you were counseling with Mr. Bronson yesterday at Counsel Table during the examination of Mr. Johnson?

A. Yes, I was giving him ideas on the structures such as the Uecker Patent; when Mr. Johnson tes-

(Testimony of George B. White.)

tified that it will fall out the same way as the other, I called his attention to the patent, that it would not. * * * * *

Direct Examination (Resumed)

Mr. Bronson: Q. Did you examine the file wrapper in this [122] case in suit, Mr. Johnson's patent? A. I did.

Q. Have you prepared an enlargement by photograph of his device as it is shown in the file wrapper?

A. I have prepared an enlargement of figures 2 and 3 of the drawings of the patent which show enlarged the adjusting structure.

Q. I have his patent here which I am holding up showing three figures. The two at the bottom which are enlargements of the extensible leg are the parts that you enlarged? A. That is right.

Q. Will you put that up on the Board for such reference as you may make?

(Whereupon the enlargement referred to was placed on the board.)

Mr. Bronson: Do you have also with you enlarged drawings of the prior art that was cited by the Patent Office in the file wrapper by that office in connection with the granting of Letters Patent on Mr. Johnson's device?

A. Yes, I had photostatic enlargements made and grouped them according to their various characteristics.

Q. Can you put those up on the board so that they are visible one by one to the jurors?

(Testimony of George B. White.)

A. I can't put them up one by one because they are bound together. [123]

Q. That is all right; I know what you have there and we will go through them.

The Court: Put those on the hooks.

(Whereupon the enlargements referred to were placed on the Board.)

Mr. Bronson: Q. The file wrapper makes reference to three prior patents called Wilson, Finkle and Brill. Are those shown on that first drawing?

A. Yes, certain of the views. I must have it understood that in enlarging, in certain of the cases, I enlarged only as many of the views as would best illustrate the various elements in those patents. As it happens, on these three patents the entire patent drawings are being reproduced.

Q. Will you explain to the Jurors what the practice is in the Patent Office of citing certain patents? What is the meaning of that?

A. When an application is filed in the United States Patent Office, the Examiner makes a search of the records and whatever patents he finds which he considers close to the invention, he cites in a so-called office letter, in which he gives the name and the number of the particular patent and advises the applicant why his claims are rejected, and thereafter the applicant has a chance to argue—submit an argument to the examiner stating why the examiner was wrong in rejecting the claims, or write new claims if he wants to; and then examiner goes through the same procedure again until

(Testimony of George B. White.)

such time that the examiner agrees to allow certain claims, such as in this application, one claim, because he cannot produce at that time any additional reference closer to the ones that have been previously produced. And these three patents are among the patents which the examiner cited. We call them references cited by the examiner during the prosecution of the application in the United States Patent Office.

Q. I show you on Exhibit 3 of the Plaintiff in this case,—that is the file wrapper—the pages are not numbered, but it is the fifth from the last page, a sheet entitled “References cited.”

A. That is part of what we called the file wrapper and contents which is in evidence here as Plaintiff’s Exhibit 3. On Page 40 there is a summary of all the references cited by the examiner against this application in the patent office, and the first three of those references are the patents to Brill, Willson and Finkle. The three are produced on the first page of the photostatic enlargement I have on the Board.

Q. So I won’t have to refer to this, the remaining references there from the file wrapper are under what names of the patentees?

A. The remaining references are Luarde, Fogelstrom, Uecker No. 2,043,498, Burman, Kotler, Prowd. These are the United States patents. I have all of these reproduced excepting the [125] reference to Kotler, because that is just a duplication,

(Testimony of George B. White.)

as I will point out, of certain of the other references reproduced.

Then there was cited a foreign patent, a British patent granted in 1885. And those are the total references.

Now, turning to the drawing there closest to you which you have identified as Mr. Johnson's patent in this suit, certain coloring matter is on there. Can you explain to the Jury the coloring scheme you have adopted in that drawing?

A. I adopted a coloring scheme just to have different colors of different main parts of the part of this particular patent. In order to understand why I reproduced only Figures 2 and 3 in this case is because most of the alleged invention was directed to the——

The Court: That has already been covered, Mr. White. We know that is the only thing that is in issue.

The Witness: I have colored the tube in purple, the inner screw leg in blue; the fingers which are on the end of the tube in yellow; the split nut on the end of the fingers in red, and the collar which pushes the nuts together—I mean the nut segments together—in green.

Mr. Bronson: Q. Have you followed the same scheme on the Figure 3 there? A. Yes.

Q. For all of those devices? [126]

A. Yes.

Q. And in that case the collar in green is

(Testimony of George B. White.)

raised from the position it is shown in Figure 2; isn't that right?

A. In Figure 3, the collar—the green collar is raised so as to allow the yellow fingers to expand and also to expand with them the segments of the red nut so as to——

The Court: Mr. White, you answered the question. I always have that same trouble in trying patent cases. The attorney asks a practical, simple question that can be answered yes or no. Don't give a lengthy explanation of it, because the attorney has asked just what he wants.

Mr. Bronson: Would you go first to the Willson Patent, then to the Finkle Patent and then to the Brill Patent which was cited by the Examiner, as you stated in connection with Mr. Johnson's Patent, and explain the parts of those and how they operate. Be as brief about it, Mr. White, as you can, consistent with making your explanation clear?

A. The Wilson Patent, which is shown in the left-hand corner on the chart is a device for attaching a hook on the end of a rope, and apparently the examiner referred to it——

Mr. Mellin: If Your Honor please, apparently I must object that that is improper——

Mr. Bronson: Just describe the operation.

The Witness: It shows the yellow fingers which are half segments which can be separated, and it shows the green collar [127] for the purpose of pressing the fingers together so as to press them on the end of the rope.

(Testimony of George B. White.)

Mr. Bronson: Q. This structure in here which is B is not a steel member, but rope—not a metal member; is that right? A. That is right.

Q. And these fingers, one of them is coterminus with the hook, and the other is swiveled out on a pin, is that right? A. That is right.

Q. Is the inside of the metal part of it threaded at all?

A. No, it is not. It has certain impressions corresponding to the strands of the rope so as to grab it strongly.

Q. Let us go over here to this Brill Patent at the bottom. What is the scheme there and what is it for and what parts do you find that correspond to Mr. Johnson's?

A. The scheme is substantially the same as in the Willson Patent. It has yellow resilient fingers with the green collar to hold them together over a rope. In that case it is a hook to attach to the end of a rope.

Q. Is it threaded—any part of the inside of it?

A. It is not threaded. It has grooves in it so as to make it rough and thereby grab the rope stronger.

Q. Is there any hinge action in the fingers there similar to the one in the Willson Patent?

A. The Brill Patent has no hinged action, but it describes [128] a spring action. These fingers spring apart.

Q. Let us go to the patent of Finkle. Will you explain that?

(Testimony of George B. White.)

A. The Finkle Patent is a patent on a crutch and it has an extension leg which is colored blue.

Q. All right.

A. That blue extension leg is gripped between the lower ends of the crutch sides, which I colored yellow because they correspond to the fingers, and there is a green sleeve which pushes them together. In that case there is no thread either, but there are teeth formed oppositely, just circular grooves, so as to be sure that the extension leg is not going to fall out or slip up while the crutch is in use.

Q. You have colored the collar or the sleeves in green to correspond with this?

A. That is right.

Q. And you have the inner member blue to correspond with the blue on the Johnson Patent drawing?

A. That is right.

Q. And the teeth, or the structure corresponding to teeth, you put in yellow?

A. No, the structure corresponding to fingers are colored yellow. They are the ends of the sides of the crutch which are pressed together on the extension leg.

Q. Do you find any of the other structures that are in the [129] Johnson Patent in any of those three?

A. I do not find in any of those three any threaded connection, any split end, nor the purple telescoping tube.

Q. All right. I will turn this over if I can, and we will go to the next group you mentioned when

(Testimony of George B. White.)

you read off the other patents in the file wrapper, relied upon by the Examiner in granting Mr. Johnson's patent, the one granted to Luarde and the one to Fogelstrom, taking those together, if you can, in the interests of time. What do those patents represent?

A. They represent screw extensions in the bottoms of the legs. They amount to variations in structure, but nothing more than a threaded socket into which a threaded shaft is screwed and on which there is a rubber cushion or lug. That is to adjust the height of the legs by screwing in or out to selected height.

Q. Other than the threaded connection between the legs and the inner member, do you find any similarity between that and the Johnson Patent?

A. The similarity is limited to the threaded connection and the extension of legs; it hasn't the split nut and isn't capable of the quick sliding adjustment.

Q. And still on the patents cited by the Patent Office in granting Mr. Johnson's patent, here are the drawings of Uecker, (I will call it 498, referring only to the last three numbers) and Burman. Discuss those, please, if you will. [130]

A. In general the Uecker 498 Patent and the Burman Patent are in the same class as the previous patents; they are screw extensions.

In the Burman Patent there is a socket or sliding nut provided, and into that nut is threaded a screw extension. And in the Uecker Patent, which

(Testimony of George B. White.)

is on a scaffolding, there is inserted in the end of the purple tube a bushing which is threaded on the inside and which is also purple.

May I step up there?

Mr. Bronson: Yes.

The Witness: And this bushing is held solid in the end of the tube by a pin which is held by a wingnut tight, and the extension leg is screwed into that bushing so that it won't fall out. The only adjustment this shows is the screw adjustment; it isn't capable of sliding adjustment.

Q. Will it fall out, by the way?

A. No, it could not fall out because this screw shaft is threaded into the bushing and the bushing is held by this cross pin in place so it couldn't be taken out until the pin is moved.

Q. Will you refer to the patent description of that internal and external screw adjustment in the Uecker Patent, 2,043,498?

A. The Uecker Patent No. 2,043,498 on Page 2, the line beginning on Line 2 states:

"The foot 19——" [131]

Q. The foot what? A. (Reading)

"The foot 19 has a threaded shank 23 which engages with the interiorally threaded sleeve 21 to form an adjustable footing."

The threaded sleeve 21 is the one I described as a bushing.

Q. You have covered those. Incidentally, Uecker No. 498 is part of a scaffolding, is it not?

A. It is a scaffolding, and it also has portable

(Testimony of George B. White.)

feature in as illustrated in Figure 7, and that is described in the Patent on Page 2.

Q. We won't go over it, but it provides for a caster arrangement, is that right?

A. Yes, it provides for a caster arrangement to make it portable.

Q. Still going on with the file wrapper references—Did you want to add something?

A. I would like to add this: That there is one reference which is left out in the large reproduction, and that is the Patent to Kotler, No. 2,327,050, which is also cited by the Examiner, and the reason why I have not reproduced it is because I didn't want an enlargement, because this is practically identical with the other screw adjustments; it screws in and out.

Q. Let us go on to Pumphrey. [132]

A. Pumphrey is the British patent.

Q. Describe it, please.

A. That British patent has no particular significance in connection with Mr. Johnson's device. It is a fully collapsable tripod leg. It is either fully collapsed or full extended, it has no adjustment; but on the end of each tube there is a screw thread, and on the end of the next tube there is a corresponding screw thread so that after the leg is extended all parts can be screwed together so that they won't collapse when weight is put on them. But they are not adjustable; when they are screwed together they remain in that position extended. When the screw is loosened, then they collapse alto-

(Testimony of George B. White.)

gether and they are not adjustable either way as to length.

Q. Other than the telescopic feature?

A. Other than the telescopic feature.

Q. Is there any similarity that you find by comparison with Mr. Johnson's device?

A. The only similarity I found was that it had telescopic parts; they telescope into one another. Beyond that there is no similarity.

Q. The final reference in the file wrapper of the patent office as you read them off is to W. T. Prowd, which is shown in this enlarged drawing here. This is again a photograph of a page of the patent record including the upper printing and [133] date, is it not?

A. It reproduces only Figure 1 and Figure 2. The patent shows some small sectional views which I did not think necessary to reproduce in the enlargement.

Q. Will you go through this patent of Prowd and using the corresponding colors of the references to Mr. Johnson's patent, show how the Prowd Patent operates and what it is supposed to do and how that result is accomplished?

A. The Prowd Patent is a pipe coupling.

Q. A pipe coupling?

A. Yes, a pipe coupling.

Q. Is that the way it is described?

A. That is right.

Q. In his own drawing?

A. In his own drawing.

(Testimony of George B. White.)

Q. All right.

A. And the object of it is to take the pipe (5) and couple to it the pipe (7). And for the purpose of that coupling, Prowd uses this split nut principle; mainly, it has the red nut segments just like the red nut segments of the Johnson Patent.

Mr. Mellin: If Your Honor please, I object to that conclusion of the witness, "just like". If he wants to explain the references, I think that is proper; but his opinion as to how it is like is a conclusion which is for the Jury and for the [134] Court.

Mr. Bronson: That may be a conclusion. This is a little technical requirement to merely identify it on the drawing. I think that is all he intended to do.

The Witness: Which corresponds to the split nut, in red, and it has the yellow fingers which carry the split nut members, and it has the green collar for the purpose of pushing together the split nut sections when the threaded portion of the other part (7) is inserted there as it is shown in Figure 1 of the drawing.

In order to release the pipes, this collar, green collar, is pulled off as shown in Figure 2, which allows the yellow fingers to spring apart, disengages the red nut segment so the blue threads of the pipe (7) allows the pipes to be taken apart.

I do not find in the Prowd Patent the telescopic tube of the Johnson Patent. In other words, the two pipes do not telescope into one another. When the pipe is pushed in, that is a fixed position, and the

(Testimony of George B. White.)

coupling locks it in that fixed position; it is not adjustable as to length. Once it is in it stays in and it is tightened up and that is the end of it until it is disengaged. [135]

* * * * *

Mr. Bronson: Q. Mr. White, the part of the Patent which you last described before the recess as shown on the drawing is the last reference in the file wrapper of the United States Patent Office in the letters granted to Mr. Johnson; is that true?

A. Those are all the references that the Examiner cited in the file wrapper. Prowd is the last I described. There are no other references in the file wrapper.

Q. You say that you have made a search or search has been made for other prior art patents pertinent to the Johnson Patent; is that true?

A. Partly by other and partly by me personally.

Q. What is the first one you will call the attention of the Jury to having any of the features of the Johnson Patent? Refer to it, please, by name, number and date.

A. The first enlargement is the patent to Athans, No. 1,679,017, which was granted on July 31, 1928, on an application filed on June 9, 1927. The significance of the Athans Patent with respect to the patent in suit——

Mr. Mellin: If Your Honor please, I object to this line of testimony, "the significance." Now he is giving his conclusion. If he wishes to describe what is in the patent, we have no objection.

(Testimony of George B. White.)

The Witness: The Athans Patent——

The Court: There is always difficulty in restraining experts. I don't say this to be cranky, but lawyers can argue their case and can draw their own conclusions, and it is not necessary to put a lawyer on the witness stand to take his argument under oath, which used to be the practice in these patent cases. As long as the testimony is confined to an [138] explanation of the patent, it is perfectly proper; but the Jury and the Court has to understand, of course, but the witness cannot go any further.

Mr. Bronson: Yes.

The Court: Because otherwise it becomes argumentative, and the argument is not added to in any way because it is given under oath.

Mr. Bronson: I am not apologizing for Mr. White, but I am sure it was an inadvertence.

The Court: I can understand that because a man gets immersed in it and he wants to talk about it; but by and large the men that are immersed in these subjects that want to talk have no terminal facilities, they just keep talking. It is much better if you will ask the questions, Mr. Bronson, and point out what you want to have pointed out to give us the explanation of the patent. You know what you are getting at.

Mr. Bronson: You may be assuming something not in evidence there, Your Honor. I wish I had the facilities that you mentioned a minute ago that

(Testimony of George B. White.)

these gentlemen acquire with years in that profession.

Mr. Bronson: Q. In this patent, do you find the outer tubular member as a part of a leg arrangement?

A. I marked in this patent in purple color the outer-tubular leg extending from the bottom of the table.

Q. Now we are going to try, at least for awhile, to follow [139] the Judge's suggestion that I direct the examination.

Now you colored this in purple. Where is that structure on Mr. Johnson's device as pictured there, shown in purple.

A. Also in Mr. Johnson's device it is the outer tube of the leg.

Q. That is a long member that goes up clear to the top of the scaffold that you show only the bottom of? A. That is right.

Q. Do you find integral fingers on this patent?
* * * * * [140]

Mr. Bronson: Q. Will you state whether or not in the Athans Patent there are integral fingers, integral with the outer member, and if so, indicate them? [141]

A. I indicated by the yellow color the spring fingers on the Athans patent which are in the lower end of the purple tube, outer tube.

Q. That is what kind of a device, by the way?

A. That is the service table that you talked about.

(Testimony of George B. White.)

Q. What function does it provide?

A. The purple part is the outer tube of the telescopic leg.

The Court: That is so that those legs can collapse?

The Witness: No; that is so that the legs can be adjusted to any length.

The Court: So a waiter bringing in this table can put it lower or higher?

The Witness: That is right.

The Court: That generally is the purpose?

The Witness: Generally the purpose of it is to adjust the height of the table wherever you want it.

Mr. Bronson: Q. Is there a slidable ring or collar on the Athans device, and if so, indicate it?

A. It is indicated in the green collar. The green collar, 15, which is for the purpose of pushing the yellow resilient fingers together in order to clinch upon the inner blue member so as to hold the two telescoping sections of the leg in an adjusted position.

Mr. Mellin: May I interrupt the testimony and have that question again? Did I hear the word "slidable" in there? [142]

(The Reporter read the previous question.)

Mr. Bronson: Q. The inner member you have colored in blue to correspond to the inner member of the Johnson patent? A. That is right.

Q. And will you state whether or not there are any threaded portions that engage between the inner leg and the outer leg on the Athans patent?

(Testimony of George B. White.)

A. There are no threaded portions between the purple outer tube and the blue inner leg for any engagement. The only threads are in the inside of the green collar 15 which is in the form of a tapered nut, and which is not shown in the patents but described in the Athans patent is that there are threads on the ends on the outside of these yellow fingers so that as this collar is turned it will push together the fingers into solid engagement with the blue inner member of the leg.

Q. Let me take a pointer in connection with the last interruption there. Does the collar in the Athans patent colored in green slide up and down on the Athans patent as the color does on the Johnson patent?

A. It does not; it is threaded on the inside and it has a tapered nut which pushes together the fingers against the other leg.

Q. What is this little place shown by the two lines and a circle? [143]

A. These are the slits between the resilient integral yellow fingers.

Q. Can you state whether or not they represent an aperture going down to the middle of the outer ring as in the Johnson patent?

A. They do. They are slits going right through so the fingers are resilient and separate, and so they can spring.

Q. In connection with this search you developed another Uecker patent than the one that was referred to in the file wrapper. This one has the

(Testimony of George B. White.)

terminal numbers 114 in place of 498, the terminal numbers of the Uecker patent that is in the file wrapper. What does this Uecker patent apply to?

A. The Uecker patent is what is termed a scaffold jack. It is a patent granted in 1940 on an application filed in 1938.

Q. Describe it in the same manner.

A. This is a scaffold jack. The purpose outside tube of the scaffold rests upon the top of a nut and surrounds a portion of that nut. The nut is turned by way of a handle around an inner blue screw member, so that when the nut is turned in one direction or in another it will advance up or down on the blue screw shaft and thereby will push the leg, the purple leg higher or lower according to the adjustment required. The only adjustment possible on this Uecker patent is the fine adjustment through threads. It cannot be adjusted [144] like the Johnson scaffold by dropping it out. On the top of blue screw member there is a cylindrical member which happens to be tubular. On the top and inside of that cylindrical member is a spring, and the spring pushes out through an opening on the side of this tube against the inside of the purple tube so as to create friction and prevent this jack screw from falling out of the outer tube when the top is lifted. And that is the function of this cylindrical member on the top, to press and also to guide and raise this inner blue screw member.

Q. What is the corresponding part, if any, on the Johnson patent to that cylindrical tube?

(Testimony of George B. White.)

A. The part marked 17 on the top of the blue screw in the Johnson patent.

Q. This Uecker patent with the terminal numbers 114 is, you say, a scaffold, and I am calling your attention to Figure 1. That indicates what?

A. Figure 1 indicates that the scaffold is on even ground and the legs can be adjusted so that the scaffold will be on the level.

Mr. Bronson: Now we have the Countryman patent. I am referring to these not by the exhibit number but only by the name, Your Honor.

The Court: That is all right.

Mr. Bronson: If we can follow it that way. [145]

Q. Describe the operation of the Countryman patent. In the first place, what is it for?

A. The Countryman patent is an automobile jack. The patent has very many figures; in fact, it has five sheets of drawings. I reproduced only Figure 1 on the first page of the drawings and Figures 6 and 7 on the third page of the drawings, because this is the part of the device that I considered pertinent. This part of the device pertains to an adjustable support on the top of the jack. The idea is to adjust the jack when it engages the automobile both quickly and slowly. For that purpose on the bottom of this purple tube, 25 and 27, there are pivoted a number of yellow fingers, part number 30, the lower ends of which are formed into the split nuts, the red split nuts 28. There is a green collar on the outside of these fingers, the purpose of

(Testimony of George B. White.)

which is that when it is pushed out it engages these little lugs or ears on the fingers to keep them away from the blue screw shaft, thereby allowing this tube to telescope quickly up and down relative to the screw jack 1 and thereby the coarse adjustment is made. For fine adjustment then this green collar is pushed down into the position shown in Figure 7, thereby it presses the red nut segments into threaded engagement with the blue shaft and allows the turning of this purple tube into the fine threaded adjustment. Therefore, to repeat again, when the green collar is in the up position as shown in Figure 6, this [146] outer tube can be moved quickly up or down for any adjustment, and when a fine adjustment is required, then the green collar is pushed down in order to push these nut segments into engagement with the thread on the blue inner shaft so that a fine adjustment can be accomplished.

Q. And what does Figure 1 show?

A. Figure 1 shows in side view any engagement for the threaded adjustment.

Q. These two figures that you have in yellow here, they are shown in yellow in Figure 1, are they?

A. That is right; Figures 6 and 7 are showing the same as Figure 1, only they show it in section as though the tube was cut in half, vertically, so you can look on the inside of it.

Q. How much of the circumference of the shaft does each one of those adjustable screw-threaded

(Testimony of George B. White.)

lugs—how much of the circumference does each one of them take up?

A. Each of them takes—each of the segments of the red nuts there takes up one-half. They are half-segments.

The Court: What did you say? I didn't follow that last. What did you say that yellow 29 is? That is the pawl, isn't it?

The Witness: Yes, that is the pawl. I described it as fingers.

The Court: That is what engages into the——

The Witness: The lower portion of the pawl. The upper portion, the yellow portion, is pivoted and moves in, and the lower portion is threaded for engagement. I divided the two parts in there to show the part which supports the threaded portion on the bottom.

Mr. Bronson: Q. So far as function goes, that red portion that engages the screw thread corresponds to this split nut?

A. It is a split nut for the purpose of engaging the screw thread to——

The Court: Is this the earliest patent of the jack type in an automobile that you found?

Mr. Bronson: I don't think so, Your Honor.

The Court: There were earlier ones?

Mr. Bronson: There must have been. I am not familiar with them. We were looking in our search for quick and rapid adjustments and then fine adjustments.

(Testimony of George B. White.)

The Court: But this is an automobile jack, isn't it?

The Witness: This is an automobile jack on which the other parts of the patent, Your Honor, show it as a——

The Court: I know that there are other parts of it, but generally so the jury can understand what we have been talking about, that is an automobile jack, is it?

The Witness: The reason I couldn't answer yes or no whether this is the earliest I found is because of the large [148] number of patents in the Patent Office on the same subject, I might have found, but this is the earliest I found in Washington in 1933 on this type of jack.

The Court: All right. I imagine, Mr. White, that there must have been a lot of patents at some time or other in connection with these automobile jacks, or am I wrong about that?

The Witness: I believe—my recollection is that there were in the neighborhood, of this subdivision, of about 600 patents. This type of devices go over various classes of inventions. I examined in Washington in January about 18 of them out of 5400 patents there and I looked over not more than 1100.

The Court: This field of automobile jacks used to jack up automobiles and like things is a very big field?

The Witness: That is what we call a crowded art.

The Court: That is what I thought.

Mr. Bronson: The next one in serial order of

(Testimony of George B. White.)

the prior art that we introduced is the Taylor patent which is described as a screw clamp. Will you describe the operation of that to the jury, carrying forward in the same way the references to Mr. Bronson's patent where you find similar functions?

The Witness: First, Your Honor, I deliberately turned around the Taylor drawing. In the patent these blue shafts, are horizontal, but as an illustration I had it colored so [149] that the blue screw shafts show in a vertical position. This is not a leg; this is a screw clamp, the purpose of which is to take the two jaws and put an object between them and then to tighten up on the screw legs and clamp this by a quick adjustment and then by a tightening screw adjustment.

This patent illustrates the split nut principle as it is adapted to a screw clamp. It has it in the blue inner shaft. It has outside of it a purple-colored bushing which extends through one of the jaws. This bushing is rotatable around the blue shaft—screw shaft. On that bushing there are pivoted a number of yellow fingers—two in fact—and on the end of each yellow finger there is a half of a red nut. Outside there is a green collar which slides up and down for the purpose of allowing, in the up position, the yellow fingers to expand, and to push them together in the down position and engage the segments, the red segments of the nut and push them into engagement with the threads of this blue shaft.

(Testimony of George B. White.)

And I might add something here. The fingers—the yellow fingers are not spring fingers. There is a small spring which is hard to see, a leaf spring on the inside of the device for the purpose of pushing these yellow fingers outwardly. To accomplish the adjustment first the green collar is pulled away from the red nut and allows the fingers to expand, and then this entire jaw, movable jaw, is moved [150] on the screw shaft into the position quickly for a given adjustment. After the given adjustment is accomplished and you want to tighten it up, then the green collar is pushed down over the red nuts and then the fingers are grabbed on this whole purple collar here, pushing, and is turned around just like any nut would be turned around for the purpose of the fine adjustment, namely, the tightening of the clamp in position.

This illustrates the split nut principle application to a screw clamp in which there is a quick adjustment by sliding and a screw adjustment by turning.

* * * * *

Q. Next in order is J. Burns, a patent called a temper screw. Will you explain that?

The Court: Which one is this?

Mr. Bronson: J. Burns.

A. J. Burns, Number 1,181,734, patented in May 1916. I would like to explain the function of the temper screw. It is a lug. A temper screw is used in well drilling. In oil wells the drill bit is supported on a supporting structure and as it is moved up

(Testimony of George B. White.)

and down they want to lower it just enough so that every time the bit on the down stroke gets [151] into the well it will hit the bottom. And for that purpose there must be an adjustment, a screw adjustment so that after each stroke when the drill bit comes up they turn the screw once so as to lower the bit just enough so that it will hit the bottom again when it goes down.

And after the entire screw is played out or it is paid out to such an extent that there is no more screw, there is a quick adjustment required so as to grip the screw again and start the operation all over.

The Burns patent is one of these temper screw patents which illustrates that.

The Court: Mr. White, could I interrupt you? The temper screw is something that is well known?

The Witness: Yes.

The Court: As a device?

The Witness: As a device.

The Court: And so the jury will understand it, the Burns patent that you are now speaking of is a patent on a temper screw?

The Witness: It is a particular kind of temper screw; that is right. There are a large number of various kinds of temper screws and we illustrate a few of them. On this temper screw there is first a support which, as you know, is hung on a cross beam or rather, a walking beam as they call it. And inside of that there is the blue threaded [152] shaft on which you carry the drill. I colored yellow

(Testimony of George B. White.)

the lower portion, the lower ends of this fixed support in order to illustrate the part which operates as a finger to spring apart; in other words, inside of your—on the end of your fingers, yellow fingers, there are the split nuts, red split nuts 16. Around the lower end of these fingers there is the green collar, which in this case is not slideable up and down but it has a set screw on the side to tighten it or to loosen it, when it is required.

I will explain that. After the blue screw 1 is low, that is, the blue guide 6 on the top, and the thread gets down to that red nut and cannot go any further, then the operator releases this green collar by the set screw, which allows these yellow fingers on the lower ends to spring apart to disengage these red split nuts from the blue screw, and then the entire screw in this case can be pulled up by this rope into a telescopic position and then the ring tightened up again in that position to re-engage the split red nuts with the blue screw and thereby you can continue that threaded engagement.

It offers a quick engagement for telescoping those together, and then there is a threaded engagement or threaded adjustment by handles 21 turning the screw every time on the down stroke.

Mr. Bronson: Q. You colored those different elements [153] of the Burns patent to correspond with the functions supplied by various parts of the Johnson patent, did you?

(Testimony of George B. White.)

A. I have colored them corresponding to the corresponding parts of the Johnson patent.

Q. Here as you look at this there is no green ring but you colored the screw that you said tightens——

A. There is a green ring, but the green ring instead of being slideable, it has a set screw in it, in order to push the fingers together.

Q. Instead of having a tubular column here you have a yoke?

A. That is right. We have sort of a yoke of parallel members instead of it being a complete tube.

Q. With the same notion in mind that you have under the Hinckley patent?

A. The Hinckley patent is another illustration of a temper screw in feeding oil well drills. It operates on the same principle, only in the opposite direction. In this case there are ratchets provided in the tube for turning the screw by a rope. The operator pull a rope and then this ratchet turns in order to feed the screw. We have the blue screw member telescoping inside of this purple yoke, which purple is the tube in the Johnson patent. I colored yellow the spring nuts of that tube, because they spring about; they are fingers, and the red split nut which is held in engagement with the blue screw by a green collar which is [154] again controlled by a set screw.

Q. Have you got a coarse and a fine adjustment on that?

(Testimony of George B. White.)

A. Yes; by disengaging the set screw you can get a quick adjustment between the two telescoping parts. By engaging the set screw and pushing the red nuts in engagement with the threads of the blue shaft there could be a fine thread adjustment step by step.

Q. And your split nut in this case has an internal threading?

A. The split nut has an internal threading, like all split nuts, including Johnson's.

Q. Before we go to the next patent, with reference to the Burns patent which you last described, what is the function of this solid blue part called 6, with reference to the question of whether that inner threaded member can fall out of the yoke device that represents the outer member?

A. The bar, the top member 6 there, is sort of a head on the end of the blue screw, and it slides in a guide-way formed in between these purple members and its function is first to guide the screw and press it, and of course it does not permit the screw to be turned any further than the head 6.

Q. Does it prevent the inner member from wobbling?

A. In that grooved operation, yes, it would prevent wobbling, and it would prevent it being screwed out completely.

Q. Hinckley is another temper screw, is it not?

A. Hinckley is another temper screw as I described upon this stand.

(Testimony of George B. White.)

Q. Does it have a yoke which you have colored purple, and does it have an inner member?

A. Yes.

Q. Which you have colored blue? Does it?

A. It has that, and it has the yellow fingers, the red nut, and the green collar, and it also has "D", which is the head on the end of the screw which would prevent the screw being entirely unscrewed beyond the red nut.

Q. Does that permit a coarse and fine adjustment by operation——

A. Very definitely.

Q. ——and engagement between the internal and external threaded members?

A. That is the sole object of a temper screw.

Mr. Bronson: Do you want me to continue on?

The Court: You have several more of those?

Mr. Bronson: We have finished those temper screws. There are several more, Judge.

The Court: I think then we will take the recess. We will have a recess for lunch now, ladies and gentlemen of the jury. Please return at 2:00 o'clock.

(Thereupon an adjournment was taken to the hour of 2:00 o'clock p.m. this date.) [156]

GEORGE B. WHITE

recalled as a witness on behalf of the defendant, who, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Mr. Bronson: Q. The next of those devices that your search developed not mentioned in the file

(Testimony of George B. White.)

wrapper connected with the Johnson patent, was Stevens and Warfield, Number 351,474, October 26, 1886; is that correct? A. Yes.

Q. Will you describe the operation of that, briefly, please, and make a comparison as you go with the elements one by one that are found in the Johnson patent?

A. The Stevens patent is on an adjustable nut for calipers or dividers.

Q. Is it a split nut?

A. It is a segment or split nut as it is indicated by the yellow elements which support the red threaded nut portion. In order to engage the blue threaded shaft there for the purpose of adjusting the distance between the arms of the calipers it is necessary first to have a quick adjustment instead of screwing the nut, so for that purpose the nut is released from the green sleeve there. [157]

Q. Will you continue to call that "collar" so we are using the same term? A. The green collar——

Q. I didn't mean to interrupt you, but if you say "sleeve" one time and another time "collar" it may be confusing. Is that what you call a sleeve what we have called a collar?

A. That is right, it is a green collar; and when the nut is pulled out of there then these yellow portions expand and separate the red nut portion from the threads of the blue shaft there, and the one arm can be collapsed slidingly for a quick adjustment. When it is quickly adjusted to the approximate position, then the nut is pushed back again

(Testimony of George B. White.)

into this green collar, then it can be turned for the fine adjustment. So this is an illustration of the segment or split nut principle with the telescopic member relative to another one, which is in connection with calipers.

Q. Here is a device that is a caliper with a sliding member that can be tightened when it reaches the collar and then bind. Does that generally represent the principles in the Stevens patent of 1886?

A. It is pretty close. The collar, which is black in this case——

The Court: Mr. White, why don't you try to answer the lawyer's question and then explain? [158]

Mr. Bronson: Q. Does it generally represent the principle?

A. It generally represents the principle.

Q. Does it have the elements that you have now described to the jury from the drawing of the Stevens patent?

A. Yes.

Mr. Bronson: I would like to have that marked, if the Court please, as an exhibit.

(Thereupon calipers were marked Defendant's Exhibit O for identification.)

Mr. Bronson: Q. I think each one of these questions I am about to ask you can be answered with a yes or no answer.

The sliding collar that is marked in green on the Johnson patent, what member corresponds to that on this caliper as I hold it in front of me here?

A. The black collar here which I am moving and sliding along.

(Testimony of George B. White.)

Q. The split nut device on the Johnson patent represented by the red portion there is here in what part of the caliper?

A. It is the threaded end of this nut where the taper is.

Q. And that slides freely on there as long as it is not locked with the collar; is that correct?

A. That is right.

Q. So that the coarse adjustment can be done as long as the collar is not in engagement with the split nut? [159]

A. That is correct.

Q. But when it makes the engagement it locks the jaws of the part corresponding to the split nut; is that right?

A. It locks them together and presses them against and into the threads of that shaft there so that you cannot slide it any more.

Q. Does that correspond to the action of the green collar?

A. That corresponds to the action represented in Figure 2 of the Johnson patent where the red nut is first in contact with this, in engagement with the threads of the blue shaft.

Mr. Bronson: In the interests of time—I don't know whether Your Honor would permit it or would even suggest its propriety, but I can go ahead. I have handed the device representing the Stevens patent to the jurors for examination, but I can go ahead with the next drawing and I think we can gain some time.

The Court: Whatever you wish.

(Testimony of George B. White.)

Mr. Bronson: As long as I am not distracting more than one or two jurors at once.

Q. I am showing you the Birch patent for a gun wiper, No. 210,235 being patented in 1887. Will you describe how that device works, again referring to the devices that correspond, if any, in the Johnson patent?

A. The Birch is a gun wiper and he uses the split or segment nut principle at the lower end of it for the purpose of [160] quickly clamping the wiper into position. The elements are the yellow fingers which are resilient, the ends of which are threaded just like the segmented or split nut, and the green sleeve on the outside which can be moved up or down for the purpose of pressing the segment or nut upon the threads of the blue shaft.

Now I want to have it understood that this is not a truly telescopic arrangement. This short blue shaft which is shown in enlargement in the upper end of this photostat is not long enough to allow both fine and coarse adjustment. This is merely a representation of the split nut principle as early as 1878 for the purpose of quickly opening up and allowing the sliding end of a threaded shaft to clamp down on it so that afterward if you want, you can tighten it with a fine movement.

I also call attention to the difference of the structure of Birch and Johnson, to the effect that the green collar is not truly slideable, because in this case the green collar has threads on the inside and these red nut segments also have threads on the

(Testimony of George B. White.)

outside, so instead of a sliding collar, the collar is threaded, turned around for the purpose of pushing the segments of the nut together.

Q. Now we come to Michelin, January 26, 1904, the patent number being 750,675. What is that device for? It is described if I may read it, as a "nut for safety bolts, air valve caps, [161] or other analogous purposes." You have examined that, Mr. White; do you have analogous parts to the Johnson patent in the Michelin patent?

A. First, I wish to state, Your Honor, that that is only a reproduction of the first page of the drawings of the safety bolt. In the patent there is another page in which there are certain views which shows the application of that to valve caps for quick adjustment of the valve caps.

This particular structure shown in the enlargement was a safety bolt of the old-fashioned tire where it was necessary to clamp the tire to the rim. This lower portion represents the tire casing "C" or the beads of the tire, and "E" is the rim of the tire. They used to provide a washer on the inside or a head for the bolt, and then a safety bolt was extended to the rim, and after the tire was so assembled then they wanted to have a safety arrangement with a quick engagement of this nut with the bolt. For that purpose they provided a purple head on the nut, which is solid.

Q. Now, wait a minute; you don't mean on the device it is purple, but you have indicated it by a purple collar in your color scheme?

(Testimony of George B. White.)

A. That is right; provided with a head which I colored purple on the drawing, from which extends integral resilient fingers, four of them, which are colored yellow, the lower ends of which are formed into the split or segmental nuts [163] colored red. On the outside there is a green collar which can be slid up or down. When it is in the position shown in Figure 3 or Figure 1, then it has a quick adjustment which just slid down on the bolt, and then the final tightening or fine adjustment to the point of Figure 4. The collar—the green collar is pushed down over the red nut segments to push them together into engagement with the blue bolt there and then thereafter the whole nut with the collar can be turned for the purpose of the fine adjustment.

That is about the earliest example that we could find for the showing of the split nut principle with integral resilient fingers for the purpose of quick engagement with a bolt when it takes too long to screw the whole length. These bolts had to be long, the patent states, and the patent also states in order to save time while screwing that nut on a bolt the whole length of it, this invention was conceived at that time with resilient fingers and the split nut for the quick engagement and then the tightening upon final engagement.

Q. The tightening up is done by what method?

A. By turning of the green collar.

Q. That is called "H" on here.

A. That green collar has little projections on the inside which go into the slits between those fingers

(Testimony of George B. White.)

so that when the green collar is pushed down in that position, then by turning [163] the collar by these wings the fine adjustment can be accomplished.

Q. I have an aluminum casting here with a collar device on it with wings on it prepared as a model for the assistance of the Court and jury in this case.

Can you state whether that device that you have in your hand—I have shown it to the opposing counsel—correctly represents the Michelin patent as represented by the drawings down to the point that I am indicating now; that is where the red inner member reaches a broader structure?

A. Well, the inner member is blue.

Q. Yes?

A. It correctly represents the structure up to the point of that “G” part.

Q. Right there?

A. Yes, that structure.

Q. All right. Now part of the inner side of what represents the collar in this device you say has the ridge that engages with those slots. Is that shown on the model there? A. Yes.

Q. Now, Mr. White, taking this device,—I have left this member on here just to divide the shaft for some purposes I will develop later—that sliding represents the fast adjustment on the Michelin device?

A. That is right. That is exactly the same adjustment as [164] you would accomplish with any

(Testimony of George B. White.)

split nut: when you open it up you allow it to drop down.

Q. Taking the split nut, the internal threading is shown at the lower portion of it there; is that correct? A. That is correct.

Q. And that is what engages with the external threading on the inner member; is that correct?

A. That is right.

Q. And then in pulling the collar down you tighten it and then you get no slide but you can make a slight adjustment?

A. It is positively locked into the threads thereafter; the only way you can have relative movement between the two is by turning the nut which became solid on the shaft.

Q. I have here threaded to the same size inner member, this; what does that represent to you, that collar?

A. This represents substantially the structure shown in the Johnson patent.

Q. What part of the Johnson patent does it represent now?

A. Just the part shown in court, one without the inner member. It shows a portion of the tubular member which is marked purple; it shows the yellow fingers and the red nuts and the green sleeve.

Q. Compared here, this represents what structure on Figure 3?

A. The collar you have in your hand is the green collar 24 on Figure 3. [165]

(Testimony of George B. White.)

Q. And the longer device with the split fingers represents what portion here?

A. The top represents the part bearing the numeral 16 colored in purple, and the split fingers colored in yellow bearing the numeral 20, and the lower portion of the red segmental nut or split nut portion is 21.

Q. Will you fit the part I have handed you last on to this same inner member, the part I mean that you say substantially represents the Johnson patent?

A. Well, I can slide it on as it was demonstrated and can pull the sleeve down over it, and thereafter the sole engagement is the engagement between the threads for screwing it up or down as it may be required.

Q. The center piece is merely a divider?

A. The center piece is a divider.

Q. Leaving that center piece out, does the right hand member, the one with the back called Michelin on it, substantially represent the Michelin patent insofar as it represents the clutch portion and the adjustable portion, and the left hand the moveable member of the Johnson patent; the former in 1904, the latter in 1952? A. That is correct.

Mr. Bronson: I would like to have this marked as an exhibit. Let me think a minute. We will mark it all as one, unless counsel for some purpose of his own would like the [166] different parts separately marked.

Will you mark that as an exhibit in evidence?

(Testimony of George B. White.)

(Whereupon cast aluminum model illustrating the Michelin and Johnson patents was received in evidence and marked Defendant's Exhibit P.)

Mr. Bronson: Q. While the Clerk is attending to that matter, the Michelin patent hasn't this smooth-surfaced part at the upper end of the inner member? A. That is right.

Q. Can you tell the jurors among the different devices that you have reviewed thus far, not found or included by the Patent Examiner, that smooth-surfaced connection for the purpose of avoiding side wobble is found in how many of them, giving them by name?

A. I found that smooth-surfaced member in the Uecker patent, a scaffold jack, Number 2,203,114.

Q. Just a moment, please. What is the number of the Uecker patent? A. 2,203,114.

Q. To save me wrestling with these heavy exhibits, that is the one represented on a drawing similar to this (showing)?

A. That is right; it is a reduced photograph.

Q. Will you point with your pointer so the jury can see where the bearing surface is?

A. The bearing surface is along the line here marked 15. It [167] is described in the patent as far as function goes, on the first page, line 26, which states that, "The collar 27 thus cooperates with the sleeve 15 to form a unitary rigid column, and prevents wobbling of the screw 14 within the post."

(Testimony of George B. White.)

Q. On what other patent did you find that portion?

A. I found a portion not identical but for the same purpose in the Burns patent, which is——

Q. Burns? A. Yes.

Q. Again to save additional time——

A. The Burns patent has on the top of the blue screw shaft a part which bears the numeral 6 and which is a head on the top of the screw member, which is described in two places in the patent. On page 1, lines 64 and 65 it says,

“* * * the latter” (referring to the reins 5) “having flat inner faces as in Fig. 5 to form a slideway for bar 6.”

And from page 2, line 6, the sentence beginning there states,

“Thus, a non-rotatable connection is provided between the swivel bar and bar 6” (bar 6 is the member I pointed to) “slideable between reins 5 whereby the swivel bar is prevented from whirling or rotating under the twisting and untwisting [168] tendency of cable ‘C’.”

Q. Is there another patent that we do not have enlarged that shows the slideable aspect of the top of the inner member?

A. Yes, I have——

Q. Will you detach that?

A. I have the Moore patent here which shows a collar 19, on the top of which is described in the patent, page 1, line 31:

“Preferably element 19 has a snug sliding fit

(Testimony of George B. White.)

within leg member 6 and cooperates therewith for guiding and bracing the leg members 6 and 7.”

However you should explain—we should explain that that leg number 17 is not threaded.

* * * * * [169]

Mr. Bronson: Q. Will you refer to the slideable portion by number?

A. 19 is the number.

Q. And the tube in which it operates is numbered what?

A. Six.

Mr. Bronson: Is this visible to the upper row (showing)?

Q. This is not screw-threaded?

A. No, it is not screw-threaded and it shows a wedge-type of arrangement.

Q. At what number?

A. The wedge is at number 14, and it is a split wedge supported on a grooved base 11, and on 6 there is an external nut which can be turned in such a way on the outside of tubular member 6 as to pull up the wedge and thereby wedge against—frictionally against the leg 17 to hold it in that adjusted position.

Q. From what portion were you reading those two excerpts which you made?

A. I read one, only one excerpt on page 1, line 21, the [170] sentence beginning “preferably.”

Q. “Preferably, element 19 has a snug sliding

(Testimony of George B. White.)

fit within leg number 6 and cooperates therewith for guiding and bracing the leg members."

A. That is right.

Q. That is the single reference you made?

A. That is right; the same purposes.

Mr. Bronson: The number, for the jurors, that the witness referred to on the Moore patent, Exhibit N, as a slideable member is numbered 19 here attached to the leg, which is number 7, and sliding within the outer member here, with the differences noted here in a wedge-shaped locking device.

Q. Mr. White, this device is exhibited for what purpose, then—that is the Moore?

A. It is exhibited for the purpose of showing the existence of the part 17 of the Johnson patent long prior to the application of Johnson for the patent, and for the same purpose as far as guiding and bracing are concerned.

Q. Is there any distinction in the way it operates from the operation of the one claimed in the Johnson patent? A. Not at all.

Q. Is there any difference in effect that it gives?

A. None at all; it is to accomplish the same result, to prevent the wobbling of the inside member.

Q. To shorten this matter down, if I can, let me have the [171] pointer. Now the split nut features you find in the Michelin patent and in what other patents among those, if you can name them briefly,—the split nut in combination with a sliding collar to lock the nut?

A. I find the split nut principle in combination

(Testimony of George B. White.)

with a sliding collar in the Countryman patent, which was the automobile jack with telescoping parts. I find the split nut principle between telescoping members on the screw clamp of Taylor as between the clamp screw and the split nut with the bushing on it. I find the split nut principle also in telescoping parts in Michelin which is shown there on the chart. The split nut principle is shown in a slightly different form also in between the telescoping parts in those temper screw patents of Burns and Hinckley, and the same split nut principle with a sliding sleeve is shown in another kind of device in the caliper.

Q. Without describing them in each case but just giving us the name of the patent—you have done that now—for the split nut, in what one just by name, do you have the coarse and fine adjustment accomplished by means of a clutch of this type?

A. The coarse and fine adjustment is present in the Countryman——

The Court: Can't you just give the name?

Mr. Bronson: Q. Just say Countryman, and so on. [173]

The Court: Can't you give the name without stating it all over again each time?

A. Countryman, Taylor, Burns, Stevens, Hinckley and Michelin.

Mr. Bronson: All right, now I want to pass this Exhibit No. P to the jury, the one that contains as I face it now or you would be facing it, if you will excuse my back, on the right is the clutch

(Testimony of George B. White.)

member of the Johnson patent and on the left the one with the wing turning member here is the Michelin which is on the board. If the jury can quickly pass that, taking time to observe the similarity of the method, I think I can go ahead with this without distraction. It really is more for the record so we show the reference.

Q. Do you have the Mapes soft copy there, please? A. Yes.

Q. I am referring now to what is referred to as Defendant's Exhibit M, patent to Mapes May 21, 1907, Yoke and yoke-screw. Will you describe the operation of the Mapes patent?

A. There is merely another illustration of the so-called temper screw. In this case the split nut is made in two halves, and there is a wide collar which surrounds them with a set screw on the side. When it is screwed in it holds these two nut sections together; when the screw is unscrewed, as shown in this Figure, in the last figure on the drawing, then the arms spring apart and the nut segments separate, and release the screw so as to allow quick adjustment. Then when [173] the screw is screwed as shown in Figure 2 then the nut segments are in contact with the screw and the only adjustment is by turning the screw.

Q. So that is an additional patent on which you find a coarse and fine adjustment?

A. That is true.

Q. And on which you find internally and externally threaded members brought together by a

(Testimony of George B. White.)

clutch device, in this case a collar that does not slide but is operated by a set screw?

A. That is true.

Q. Mr. White, referring to the practice in the Patent Office when a search is made, does a search disclose applications for patents that have not been issued?

A. No, the applications for patents are kept secret in the United States Patent Office and are not available to a searcher, to the public.

Mr. Bronson: I have concluded the direct examination.

Cross Examination

Mr. Mellin: Q. Mr. White, the search that you conducted through the Patent Office, that was as thorough as you could make it; wasn't it as full as you could make it?

A. No, I was in Washington on other business, and I could not set aside more than two half-days in the Patent Office to [174] make the search. On all the subject classes and classes that I was to examine, there were roughly 5400 patents, and I examined approximately—I didn't count them—I would judge between 800 or a thousand.

Q. You went through the screw jack art pretty thoroughly though, didn't you?

A. The screw jack art?

The Court: What is that?

Mr. Mellin: You were talking about automobile jacks, Your Honor.

The Witness: Automobile jacks I didn't. The

(Testimony of George B. White.)

reason was it is a very, very large art, and I gave up hopelessly in the search room and I went up to the Division and talked to the primary examiner, and he called one of the assistant examiners and the assistant examiner told me that the device was old but he cannot put his finger on it. So he referred me to about four sub-classes, each of about 50 patents, which I looked over, and didn't find anything. And I asked the examiner to call up my Washington associate if he could remember the patent he told me he had in mind. After I came back to San Francisco my associate advised me that he was called by the examiner and he found the patent number, and it was the Countryman patent.

Mr. Mellin: Q. The Countryman patent?

A. Yes. [175]

Q. So you are satisfied, are you, Mr. White, that as far as the automobile jack art is concerned that His Honor was speaking of this morning, the Countryman patent would be the closest to the plaintiff's structure in that particular art?

A. That is the closest I could find, but I must add this: this sort of split nut principle runs over a number of classes in various applications where it did not form part of the invention, it was merely incidental to the structure, and therefore it doesn't show in the classification and it is unclassified. There is no single classification for this particular telescopic structure as such.

Q. As a matter of fact, split nuts as such are in

(Testimony of George B. White.)

all the arts as you have shown here; isn't that true?

A. Yes; in many cases just incidental to some other part.

Q. In other words, taken by itself a split nut is as old as the mechanical arts itself; isn't that correct?

A. That is correct.

Q. And that is generally true of all machines, isn't it? That taking a part isolated from its environment and in itself, it is substantially old in some art; isn't that correct?

A. I couldn't say for all machines; I didn't make a search on them. I can merely say that in many instances when you run into a problem and you are looking for a device to solve it, in many instances you can find it.

Q. Just a minute, Mr. White. I think you didn't understand [176] my question. I said, you take practically any machine and take one part off of it and disassociate it from its environment and you can usually find that part old in some other machine, some other art; isn't that true?

A. Yes, all machine elements are probably old.

Q. That is what I thought. You find this split nut in tire gauges, for example?

A. This was not a tire gauge.

Q. Tire stem filler?

A. No, that is a safety bolt to hold the casing in the rim of the tire.

Q. I am talking about the Michelin patent and how that works; isn't it applied to an air valve tire stem?

A. That is right.

(Testimony of George B. White.)

Q. And the purpose of that nut was not for the purpose of the patent in suit; the purpose of that nut was to enable it to come down and clamp the tire gauge to the tire or to the rim?

A. I can read to you the purpose of it.

Q. Let's not read it. You understand it. Let's answer yes or no.

Mr. Bronson: Wait; that is too much guidance. He is going right to the patent.

The Witness: I can read the purpose of the nut from the patent. [177]

The Court: Irrespective of what it says there——

The Witness: The purpose of the nut was——

The Court: Wait a minute, Mr. White. So we don't get into a lot of long arguments between the two lawyers, he just wants to know in a practical way so this jury can understand without reading from the patent, whether generally speaking that is a fair statement.

The Witness: It is not. The purpose of the nut as described in the patent was to avoid the necessity of a long threaded—screwing of the nut on a long stem screw shaft, and to have a quick and fine adjustment the split nut was developed to be put on.

Mr. Mellin: Q. In the Michelin patent, however, that I hold the pointer to, this is the valve stem of an air valve for the tire?

A. It is not described in the patent as a valve stem; it is a safety bolt to hold it in——

Q. But it would be of the order of a valve stem

(Testimony of George B. White.)

in size, wouldn't it, Mr. White, in proportion to the drawing?

A. May be; it is not stated in the patent.

Q. And the purpose of the nut was to come down and form the clamp between the elements to which I point, and that was its purpose; isn't it?

A. That is true.

Q. And there is no suggestion in that patent, is there, of [178] having that threaded bolt act as a supporting leg for anything, is there?

A. No.

Q. There is no suggestion in that patent of having anything to maintain that threaded bolt from wobbling in a tubular leg of a scaffold, is there?

A. No.

Q. There is no suggestion in that patent of anything provided in there so that you can screw that bolt out of a nut so it would drop, is there?

A. It is called a safety bolt, and the main object was that after you screwed it on it wouldn't accidentally get loose.

Q. If you wish to evade, let's point this out——

A. I didn't wish to evade.

Mr. Bronson: Wait a minute. I protest. All right; handle it yourself. There is the trouble of having an attorney for a witness, Your Honor.

Mr. Mellin: Q. As a matter of fact, Mr. White, there is no suggestion at any time that you would rotate the threaded member that I point to, which is "A" in the drawings—there is no suggestion at any time that you rotate that to effect the adjust-

(Testimony of George B. White.)

ment, is there? A. That is correct.

Q. You wouldn't say, Mr. White, would you, that the device [179] of the Michelin patent taken as there shown has the same mode of operation and accomplishes the same result as the adjustable leg of the scaffold Exhibit 8, would you?

A. I say it has exactly the same mode of operation. If you slide it on the end of a tube it would accomplish the same result, as demonstrated by this model passed around to the jury.

Q. You just told me, I understand you to say, that it had no provision to keep it from being screwed out of the leg and that it had no provision for preventing wobbling, didn't you?

A. The question of preventing wobble is old in the art, as I showed; but as far as screwing is concerned, you can take that Michelin patent, take that purple-colored collar on the top, weld it to the end of that scaffold tube in the proper size and it will operate exactly in every respect in every part as the split nut operates on the Johnson scaffold.

Q. In other words, the split nut in each instance would always operate the same if first you got the idea of welding it on to the bottom of a scaffold?

A. I didn't get the idea; that is obvious to me as an engineer and a draftsman.

Mr. Mellin: Will you read the last question?

(The Reporter read the question.)

Mr. Mellin: Q. Will you answer it? [180]

A. I didn't get the idea; it is obvious to me as a draftsman and an engineer.

(Testimony of George B. White.)

Mr. Mellin: Will you read the question again?

(The Reporter again read the question.)

A. I didn't get any idea first.

Mr. Mellin: Q. I didn't ask you about the idea. Wouldn't they operate all the same if once that was known, the split nut would always operate the same?

A. A split nut would always operate the same no matter where you put it.

Q. And there are lots of split nuts shown in all of these other combinations in these patents?

A. The split nuts, most of them are shown in exactly the same combination as the Johnson patent.

Q. Would you say then that—you gave an opinion—that looking at this tire device in Michelin, would you say then, Mr. White, that having that in front of you, that the device of the patent in suit and its features and its functions would be obvious to you as an engineer? Is that what you were telling us?

A. I would,—if you are interested in my opinion, I would reverse it; if I ran into the problem of a quick adjustment instead of the old-fashioned screw adjustment for legs of the scaffold and I needed a quick adjustment, I wouldn't have to search the mechanical books, I would know that the [181] split nut principle will definitely accomplish the purpose.

Q. I don't know whether that is an answer or not, but I guess it is the best one I will get.

Mr. Bronson: Is that a question?

(Testimony of George B. White.)

The Witness: Yes, that is the best one you will get.

Mr. Mellin: Q. You spoke of the Uecker device; is that what you called it?

A. I pronounced it Uecker; I understand what you are referring to.

Q. Uecker. As I understand it, your testimony this morning was that at no time would the leg 23 in blue fall out of that leg, is that correct?

A. Not as long as it was screwed in the bushing.

Q. But in adjusting the scaffold you turn this screw 23, don't you, to adjust it threadedly up and down?

A. That is true.

Q. And you could thread it right out of the leg if you kept turning it?

A. That is right.

Q. You don't find that in the patent in suit, do you?

A. The patent in suit provides——

Q. Can you answer that yes or no? Do you or don't you?

A. What don't I find?

Mr. Mellin: Read the question.

The Court: Read the question. [182]

(The Reporter read the question.)

A. What don't I find in the patent in suit?

Mr. Mellin: Q. Does the patent in suit have the ability to be threaded right out of the leg?

A. The patent in suit has the ability when the nut is engaged to be threaded as far as the collar 17 and the collar doesn't allow it to be threaded any further.

(Testimony of George B. White.)

Q. In other words, you can't unwind this leg out of the bottom of the scaffold?

A. No, just like you couldn't unwind anything that you had a head on, on any screw; after the head reaches the end of it, you can't unwind it any further.

Q. The Uecker patent doesn't have any provision for coarse adjustment?

A. No, the Uecker patent only has fine adjustment.

Mr. Bronson: Let the record show you are pointing to Uecker 498.

The Court: I think you had better do that.

Mr. Bronson: There is quite a little difference. Mr. Uecker corrected that a little later.

The Witness: This was the Uecker file wrapper reference to which my answer applied.

Mr. Mellin: Q. The Patent Office in its passing on the patent in suit had before it devices with split nuts, didn't it? [183]

A. One device, Prowd.

Q. So it had before it a device with a split nut?

A. It had, but your argument in the file wrapper against that was that it was not telescoped.

The Court: Mr. White, you are arguing.

The Witness: Excuse me.

The Court: He just asked you a question.

The Witness: The only spit nut device the Patent Office considered was the Prowd device.

The Court: There is no question before us; you

(Testimony of George B. White.)

were asked a question as to whether or not the Patent Office had—as to what the Patent Office had before it.

Mr. Mellin: Q. It was a patent showing a split nut for quick release of a threaded engagement with a second male member?

A. That was the Prowd patent, yes.

Q. And that split nut was contracted and expanded by sliding a sleeve; isn't that correct?

A. That is true.

Q. And the Patent Office considered that in passing on the patent in suit; isn't that correct?

A. That is the only split nut the Patent Office considered.

Q. Now the patent to Athans. That patent is merely a telescopic joint in which by tightening it you can effect a frictional connection as distinguished from a threaded [184] connection between two telescopic tubes; isn't that correct?

A. If I may answer it in my own way, it has an outer tube and an inner shaft which telescopes in it, and it has a clutch means to clamp the two members together fixedly. I mentioned that because of the description of the Johnson patent of the general aspects of the invention.

Q. Let's make it more simple. The connection between the two tubes when they are connected together is purely one of friction, isn't it?

A. Purely frictional; that is true.

Q. There is no mechanical connection at all?

A. That is a mechanical connection, frictional con-

(Testimony of George B. White.)

nection; there is no screw connection between them.

Q. And the sleeve in the Athans device does not slide up and down, does it?

A. No, it is screwed up and down.

Q. So to loosen one piece of the telescope from the other, you turn the sleeve, and doing it the other way you tighten it?

A. That is right. That is a conventional method.

Q. In that respect that is the way it is comparable to the device of the patent in suit?

A. I compared it to the patent in suit in the statement on page 1, line 21, which stated:

“In its general aspects, the invention contemplates a telescopic supporting leg having cooperable clutch members which may be readily disengaged from one another to permit movement of the telescopic members with respect to each other in effecting variations in the length of the leg structure.”

And every one of those elements in the general aspect are present in Athans.

Q. But, however, it doesn't have the ability for fine adjustment? A. That is true.

Q. And it doesn't have, in the sense as distinguished from frictional contact, it has no mechanical contact between the two legs?

A. Apparently your definition and mine of mechanical contact are not the same, so I prefer to say it has no mechanical connection.

Q. Would you say that the mode of operation of this device is substantially that of the device of the patent in suit?

(Testimony of George B. White.)

A. I would say that the general aspects of extensibility are the same, and I would say that it does not have the threaded fine adjustment.

Q. You would also say, wouldn't you, that it does not have an interiorally threaded nut which is operated by sliding the sleeve to effect threaded engagement between the outer and inner tubes?

A. That structural difference also exists. [186]

Q. And any function flowing from that structure is likewise absent in Athans?

A. That is true.

Q. As a matter of fact, you as an engineer wouldn't use the legs of Athans for a scaffold?

A. I would use them on a table, and my understanding is——

Q. Not what your understanding is; I am asking, would you use them on a scaffold?

A. No, not on a scaffold; on a table I would.

* * * * * [187]

Mr. Mellin: Q. Turning to the Uecker patent number 2,203,114, would you say that that has a mode of operation of the device of the patent in suit, Mr. White?

A. Not the total mode of operation.

Q. It has missing, hasn't it, the ability to make the rapid adjustment by sliding the sleeve up?

A. That is true.

Q. In other words, that device in principle is this device, isn't it, Exhibit 12 as far as adjustment is concerned?

A. In principle it is not the same device, because

(Testimony of George B. White.)

in Exhibit 12 the leg can fall out, while in the Uecker device it is frictionally held in place.

Q. As far as adjustment is concerned?

A. As far as adjustment is concerned, it is the jack principle the same as 12.

Q. In the Countryman patent that you spoke of this morning, you only described to the jury three views of it; that is correct, isn't it?

A. I didn't understand you.

Q. You only described to the jury Figures 1, 6 and 7, which is only a portion of that; isn't that correct?

A. That is correct.

Q. You didn't tell the jury, did you, that to make the fine [190] adjustment a complex auxiliary mechanism was used to advance the blue screw up and down, did you?

A. No; I stated that there were other mechanisms for turning it.

Q. I think you did say to make the fine adjustment you would turn the purple part with these pawls—the patent calls these red things “pawls”; isn't that correct?

A. That is correct.

Q. You would turn this purple part and that through these pawls would make a fine adjustment; you recall that testimony, don't you?

A. That is correct.

Q. As a matter of fact, if there was a heavy load on top here, such as an automobile on top of 26, would you explain, please, how you could turn **that** purple part to effect that fine adjustment?

A. You couldn't.

(Testimony of George B. White.)

Q. Isn't it a fact that in the patent to make the fine adjustment they have a gear and a separate nut at a point below which you jacked in the usual fashion to make the fine adjustment?

A. That is true. But may I add at this time, in order that there is no misunderstanding in the mind of the jury, that fine adjustment was not for the relative movement between the screw and the sleeve.

Q. As a matter of fact, that Countryman patent likewise made [191] no provision for preventing the screw from being screwed out of the nut or those pawls, did it? A. No.

Q. And it made no provision to stop the wobble of the leg if it were used in a scaffold? I didn't mean to foreclose you from looking at that view, Mr. White.

A. I have the patent here. No provision; if it wanted to wobble, it could wobble.

Q. That is correct. In the patent which is up there now, the Taylor patent of 1903, that was brought out by you merely to show another application of the split nut that was collapsed or extended by a sleeve; isn't that correct?

A. That is right.

Q. And that is its pertinency here?

A. That is correct.

Q. You didn't mean to intimate that it had all of the functions and mode of operation of the patent in suit, did you?

A. I mean to say it had.

(Testimony of George B. White.)

Q. Now you have before you the patent of Burns, 1,181,734. That is an oil well tool, isn't it?

A. That is right.

Q. It has no sliding sleeve?

A. It has a yoke or reins, number 5, which relatively move up and down. Oh, you mean the green sleeve? [192]

Q. The green sleeve. That isn't a sliding sleeve?

A. That isn't a sliding sleeve.

Q. You used a set screw?

A. You used a set screw on the sides for the purpose of releasing the fingers.

Q. In that patent, when you read it, you discover that there are two sides of this yoke and it has just like two fingers sticking up, hasn't it, by the shape?

A. They are flattened for the purpose of forming a base for the bar 6.

Q. And the bar 6 slides up and down?

A. That is right.

Q. And the white objects that I am now pointing to, those are in back of it, isn't that right?

A. That is right; the two arms are not tubular.

Q. In other words, if that blue screw wobbled this way, in the way I am putting the pointer, this could wobble right out of there, couldn't it?

A. If it could, yes, but it doesn't.

Q. And that would be true of the Hinckley device likewise, isn't that so?

A. That is true.

Q. The Hinckley patent that I am referring to

(Testimony of George B. White.)

is number 135,988. Now about the Stevens patent, Mr. White. That was cited or referred to by you to show another application of [193] the split nut in mechanics?

A. That is right, as between telescopic members horizontally that telescope.

Q. Would you say that the device of the Hinckley patent had the same mode of operation and produced the same results as the device in the patent in suit?

A. So far as the clutch is concerned, yes.

Q. Just that one part? A. That is right.

Q. And that is true of all of those devices that you referred to that had the split nut; isn't that so?

Mr. Bronson: I am going to object to that; it is too broad a question.

Mr. Mellin: Let him qualify his answer if he wants to.

Mr. Bronson: It is a buck-shot question.

The Court: I will overrule the objection.

A. It is not true as to all the devices.

Mr. Mellin: Q. As to which ones isn't it, Mr. White?

A. It is not true as to Countryman and it is not true as to Michelin.

Q. Those two? A. Those two.

Q. By the way, Mr. White, of all of these patents that you have brought before us and explained to the jury, which one in particular do you think is most like the device of the [194] patent in suit in construction and in mode of operation?

(Testimony of George B. White.)

A. So far as structure is concerned, the Michelin patent shows all the elements of the clutch mechanism; and so far as operation as a leg is concerned on the general aspects, as I stated before, the Athans patent shows the general adjustment with a different clutch mechanism. Countryman on the jack shows every element of the combination.

The Court: Q. What did you say just then?

The Witness: Countryman on the jack—the Countryman automobile jack shows all the elements of the combination; shows the telescopic outer element, the tube; shows the inner shaft and shows the fingers, and shows the nut on the end of them, except that the fingers are not integral and resilient; they are pivoted pawls instead of resilient fingers. And the structure of the clutch is well shown in the Taylor patent which however shows the fingers pivoted and pushed out by a spring instead of having them integral.

Mr. Mellin: Q. Which patent is that?

A. That is the Taylor patent.

Q. You say, as I understood your testimony, as far as construction is concerned, that the patent to Michelin, which was the tire rim clamp, that in your opinion was the closest to the patent structure as far as construction is concerned?

A. That has the identical structure of the clutch.

Mr. Mellin: Could we have the recess now, Your Honor? [195]

The Court: Yes. Before we do that, you did

(Testimony of George B. White.)

make an exception to the last statement, though, didn't you?

Mr. Mellin: He added to it, Your Honor; he said that that in construction and another one in operation.

The Court: No, no, that isn't what I meant. In connection with Michelin you said it was identical but at the very end you said except as to something.

The Witness: Except it hasn't got the long collar on the top of it; it has only a short collar on the top in side the long tube; otherwise it is identical.

The Court: We will take the afternoon recess now.

(Short recess.)

Mr. Mellin: Q. Concerning the Birch patent about which you testified, which is number 210,235, that is, I think you testified, a ramrod gun cleaning device? A. It is a gun wiper.

Q. That hasn't any ability for adjustment at all, has it? A. That is right.

Q. In other words, while that is important, it is another application of this old split nut?

A. The reason I applied it was because the split nut structure in it in general was very close to the device of the clutch structure shown in the scaffold.

Q. In the patent in suit? A. Yes. [196]

Q. It differs from it, however, in this respect: the sleeve "F" which is in green, is a threaded sleeve which you thread on a taper to expand or contract the nut; isn't it?

(Testimony of George B. White.)

A. That is my recollection.

Q. In the scaffold it is a split nut?

A. That is correct.

Q. There wasn't any intention on the part of Birch to have any adjustment between the two parts telescopically? A. That is true.

Q. The Pumphries specification merely shows a telescopic leg for a tripod; isn't that correct?

A. That is right.

Q. And it merely screws two parts together when you get them in an extended position?

A. I don't find that reference; that is a file wrapper reference.

Q. I mean that is the point of it, isn't it?

A. That is right.

Q. Then with reference to the Prowd patent, that shows another application of the spit nut; is that so? A. Yes, on a pipe coupling.

Q. And the nut in that Prowd patent operates in a fashion somewhat similar with respect to the sleeve and split nut to the split nut that is one of the elements of the patented device; isn't that correct? [197]

A. It is different in two main respects, if you wish me to distinguish.

Q. I didn't hear your answer, Mr. White; I'm sorry.

A. It is different in two respects.

Q. And those respects are what?

A. One is that those fingers are loose, held together by ring 12 on the pipe 5; and the other re-

(Testimony of George B. White.)

spect is that the two pipe sections, 5 and 7, are in an abutting relation end to end and do not contemplate any adjustment at all.

Q. In the Countryman patent you would find the same first criticism, wouldn't you, that the parts of the ends are independent and pivoted on pins; isn't that correct?

A. When they are pivoted on pins they are pivoted in the telescopic member, whereas in this case they are entirely independent of the pipe 5.

Q. But in the Countryman patent the pawls 28 which are in red are pivoted on pins 29?

A. They are pivotally fixed to the sleeve 27.

Q. And they are not formed as part of the fingers made as an integral part of the tube, are they?

A. They are not integral.

Q. And they are not welded or fixedly secured integrally with the tube end?

A. They are fixedly secured because the pivot cannot move with respect to the sleeve—purple sleeve 27. [198]

Q. With respect to the Mapes patent number 854152, there you do not find a sleeve, do you, which slides up and down?

A. That is right; I find a sleeve with a set screw, pushing together the segments.

Q. In other words, when you want to clamp the lower part of this big yoke to the screw you turn a crank?

A. Yes, but the crank has a screw which is threaded into one part of the collar, and that collar

(Testimony of George B. White.)

surrounds one of those sections, and the other set screw pushes it together.

Mr. Mellin: What I have my finger on is the yoke which is split (indicating). There is a fixed collar, and you crank this screw to expand it or contract it. This is the Mapes patent. Here is the yoke. Here is the fixed member. It has a screw crank to crank the two together and let them expand (exhibiting to the jury).

Q. The Moore patent which counsel showed to the jury, that also does not have a fine adjustment in the manner of screw threads, does it?

A. That is true.

Q. It doesn't have a sliding sleeve either, does it?

A. No, it has a threaded nut on the outside of the telescoping tube.

Q. In other words, when you want to let it go you have to wind that nut?

A. You have two releases. Winding the nut would let it go. [199] That reference, if I may say, that reference was not for the purpose of showing the structure in that finger structure; it was showing this unthreaded portion which is used in the top of the screw of the Johnson patent marked 17; that the same device was already used on unthreaded tubes as shown in Moore exactly for the same purpose as it is used in the Johnson patent.

Q. For many many years if you had two telescopic parts you made the tube fit rather snugly

(Testimony of George B. White.)

just like a telescope and one doesn't wobble with respect to the other, does it?

A. That isn't the purpose of the Moore patent; but your answer is true in general except in the Moore patent there is a special head formed in the same manner as the head 17 and the screw 17-A of the Johnson patent.

Q. It isn't formed there in combination with a threaded part which cooperates with a sleeve in the Moore patent?

A. That is true; the lower portion of the Moore patent is smooth; it is not threaded.

Mr. Mellin: That is all.

Mr. Bronson: I want to put in evidence, Your Honor, the large photographs as a single exhibit, the one on the right.

(Thereupon the photographic enlargements of drawings referred to were marked Defendant's Exhibit Q in evidence.) [200]

Mr. Bronson: And then the Johnson patent with the corresponding colors as the next in order.

(Thereupon colored chart of the Johnson patent referred to was marked Defendants Exhibit R and received in evidence.) [201]

* * * * *

VICTOR W. MENG

was called as a witness on behalf of the defendant, who having been previously duly sworn, resumed the stand and testified further as follows:

The Clerk: Please state your name again, Mr. Meng, for the record.

The Witness: Victor W. Meng.

Direct Examination

Mr. Bronson: Q. You have given your address and you have stated that you are president of the defendant company; is that right?

A. That is correct.

Q. I believe you said you had been employed with them for some thirty-eight years?

A. That is correct. [202]

Q. Does the company that you work for as president and the defendant here limit its scaffold business to aluminum scaffolds?

A. No, sir, we have all kinds of scaffolding.

Q. Metal scaffolding?

A. Metal scaffolding.

Q. That includes steel? A. Yes, sir.

Q. And turning to the matter of steel scaffolds, how long have they been in use?

A. Well, steel scaffolding of one type has been going back to about 1926, but the steel scaffolding of the sectional type came out around 1936—'35.

Q. And the portable type, how long have they had the portable type? That would be with the casters so that you can move it.

A. That came on around '35 or '36 in the sec-

(Testimony of Victor W. Meng.)

tional scaffolding, and of course in the other type prior to that time.

Q. When did aluminum, that is, scaffolding made out of aluminum tubing, first come into use?

A. That came into use after the war.

Q. And that would be some time——

A. Around '47—'46 or '47.

Q. 1946 or 1947. Had any rapidly-adjustable scaffolding ever been applied to steel? [203]

A. No, it isn't practical to apply that to steel because of the fact that the steel is too heavy.

Q. You observed Mr. Johnson demonstrating to the jury the extension of the legs to different heights.

A. I did.

Q. Can that be done with steel by a workman?

A. If the scaffold is only that high it probably could, but normally a scaffold is much higher. Then that weighs a lot more. This particular scaffold is very small.

Q. Did you ever know of an adjustable unit such as represented by Mr. Johnson's being used on a steel scaffold?

A. The adjustable procedure in connection with steel scaffolding was adopted in 1937.

Q. What kind was that?

A. That was a long screw somewhat like the Uecker patent with the unfinished head on it in order to stiffen up the scaffold at the top.

Q. You mean by that a smooth inner bearing surface?

A. A smooth portion at the end of the threads.

(Testimony of Victor W. Meng.)

Q. Mr. Meng, Mr. Mellin referred to that as the jack screw principle or screw jack, whatever it was; is that the type you are referring to?

A. That is right.

Q. That doesn't require a workman to do any lifting? A. No. [204]

Q. When aluminum scaffolding, tubular aluminum, came in, as you say, around 1947, that was the first type of extensible feature that was applied to that?

A. The same type as is shown in the steel scaffold.

Q. Mr. Johnson's patent application, according to the record, was in September 1947, and that would be the same year, according to your knowledge of this business, that tubular aluminum was used for scaffolding? A. Around that time.

Q. Take the scaffold as a unit, take a single four-legged unit scaffold, two or three or four tiers high, will you explain to the jury that various elements there are additional to any extension device similar to Mr. Johnson's that there are in any piece of scaffolding, sectional scaffolding?

A. First you have a caster at the bottom. That simply fits into the bottom of the threaded tube, which is a piece of aluminum threaded. It is a piece of tube. Then you get into your tube, of course, your threaded tube. The next separate piece is your frame.

Q. Consisting of what?

A. In this particular case it is a ladder frame,

(Testimony of Victor W. Meng.)

two of them, one on each side; you have your two cross pieces which are independent, and you have your platform, which is independent, and then you mentioned about going three tiers high. You would have three additional tiers of ladder frames [205] without any adjustment on the bottom. They would use sprockets in between them to hold the two pieces together. Then you would have——

Q. Is that a cross piece?

A. Then you would have your cross brace again and your platform or horizontal brace, and at the top of course you should have a guard rail.

Q. Are these scaffolds equipped with any separate ladder device in instances?

A. In the larger type scaffold, yes; there are scaffolds equipped with separate ladders. They would be in the square scaffold, six by six square.

Q. The multiplication of parts occurs as you extend your scaffolding upward?

A. That is correct.

Q. What is the lowest or simplest construction you have—a single tier, or are they higher than that for the simplest?

A. No, that I would say would be about the simplest you have.

Q. What would?

A. What you see right there.

Q. That is a single tier?

A. That is right.

Q. And then the extent they should have as a practical measure of the highest? [206]

(Testimony of Victor W. Meng.)

A. That is all depending upon your base area. You can only go so high before you get a tipping.

Q. Give the jurors some answer as to how high you can take them on a basis of that type of structure. What is that—two feet wide?

A. It is a two-foot wide. Ordinarily you shouldn't go more than four times your width under good safety practice. As soon as you go over, oh, two sections on that, you have to add to it sideways so that when a man pushes it it isn't apt to go over, or if he should roll that on a floor and he should go over a hole, that will tip over even though the leg won't fall out.

Q. I am referring you to an exhibit of the plaintiff, Number 16, which was identified by the witness then on the stand as a brochure of Patent Scaffolding Company. On the back in the lower left-hand corner there is a small print indication there. Does that tell you the date of the publication of this brochure?

A. Yes, that would indicate that this was printed in August of 1950.

Q. That was the one in which your attention was pointed to the caster and it was identified as not having the extensible device.

A. That is right.

Q. Do you know whether or not in 1950, if not earlier, you [207] were publishing the use of the extensible device such as is shown in the Johnson drawings here?

A. This particular caster on the bottom here

(Testimony of Victor W. Meng.)

with the sleeve was primarily used in magnesium scaffolding. When we first went into light metal scaffolding we came out with a magnesium scaffold, and the magnesium is not susceptible to the possibilities of aluminum. First off, we used it on the aluminum; but you will notice in the leaflet here it reads as follows:

“Using the adjustable caster illustrated below, a simple twist of the knurled nut gives the adjustment desired. Using the other type, the threaded caster leg fits into the leg of the bottom frame, and is held in position by a locking ring. Adjustments are made by releasing the locking ring.”

Q. As of the date of publication of that brochure in 1950 were you using the type of adjustment that has been described to the jury here?

A. It wasn't exactly like that, but very similar. At that time we used a bottom section where we welded the adjustment to the frame.

Q. Did it operate in approximately the same way as to the locking ring and the clutch device?

A. Yes. [208]

Q. When did you first and under what circumstances put this type of leg on a Patent Scaffolding Company device?

A. I would say it would be early in 1950, or about the middle of the year.

Q. Under what circumstances?

A. The reason we put that on is because of the fact that certain government bids were coming through specifying a leg of this type with a quick

(Testimony of Victor W. Meng.)

sleeve action, so that in order to be able to bid on those requirements for the government we had to provide that type of leg, otherwise the bid would not be considered.

Q. Do you publish price lists for the trade of the prices yourself? A. Yes.

Q. You still sell steel scaffolding, do you?

A. We do; we still sell steel scaffolding of all types, including steel rolling scaffolding.

Q. Percentagewise only, approximately what part of your business is steel scaffolding?

A. The majority of our business is steel scaffolding.

Q. More than half of it? A. Yes, sir.

Q. Substantially more than half?

A. You are now talking about the portable rolling scaffold, I presume. [209]

Q. Of your scaffold business, what portion of it is steel as against aluminum? Does that make sense?

A. No. You mean scaffold business of the portable type?

Q. Well, take the portable type, yes.

A. Well, I would say that the steel scaffolding probably is, oh, six or seven times that of the aluminum. That would be an offhand figure.

Q. That is portable steel as compared with portable aluminum? A. That is correct.

Q. And do you have a business in non-portable scaffolding such as they use for permanent construction work on the outside of buildings?

A. That is correct.

(Testimony of Victor W. Meng.)

Q. You publish those price lists on the aluminum portable scaffold, do you? A. We do.

Q. I will show you here such a price list that you have provided me with. Can you say when that was published?

A. This particular price list was printed on May 1st, 1953.

Q. The prices do not remain exact, I take it; you change from time to time, do you?

A. Oh, yes.

Q. Does that price list show the price that you charge for aluminum portable scaffoldings with the adjustable leg and aluminum portable scaffolds that you sell without the [210] adjustable leg?

A. This particular price list shows that for both types.

Q. Will you state to the jury—I will have to look at it for just a moment. It shows prices for different sizes, 10-foot, 8-foot, 6-foot?

A. That is correct.

Q. Is that width?

A. That is the length in this particular type.

Q. Let us take the 10-foot first. What is the price for a section of aluminum portable scaffolding in that length without the leg?

A. Without the special leg it is \$150.40.

Q. And with the adjustable leg what is the price? A. \$160.60.

Q. And that differential of ten dollars and some cents contemplates how many adjustable legs?

A. That would contemplate four.

(Testimony of Victor W. Meng.)

Q. So that the differential in price for actual individual leg is approximately \$2.00 and——

A. \$2.55.

Q. \$2.55. Take the next size and give us the same figures and state the differential.

A. On the 8-foot wide scaffold the price without the leg is \$142.15, and the price with the leg is \$152.35.

Q. And the differential? [211]

A. Is \$10.20.

Q. And that contemplates, that differential, four legs?

A. That also contemplates four legs.

Q. What is the last size that you quote on that particular list?

A. The last size is a 6-foot long scaffold, ladder scaffold, and the price without the adjustable leg is \$134.65, and the price with the leg is \$144.85, again a difference of \$10.20.

Mr. Bronson: I will ask that that go into evidence and be marked, if the Court please.

(Whereupon price list referred to above was received in evidence and marked as Defendant's Exhibit S.)

Mr. Bronson: Q. Assuming that there has been some difference in prices with the passage of time, let us say from 1952 and 1953, can you state generally whether any variations in the pricing of that particular part of your product the differential is about the same for this, or is it substantially different?

(Testimony of Victor W. Meng.)

A. No, I would say it would be about the same.

Q. Have you any figures on the actual breakdown of the cost of the making of this particular leg?

A. I do.

Q. Will you produce it, please, and I will ask you some questions. In the first place, have you got it broken down for [212] labor and for material?

A. Yes, sir.

Q. On a per-unit basis rather than for a whole scaffold?

A. On a per-unit basis.

Q. That would be for a single leg?

A. This happens to be for a single section, two legs.

Q. Two legs?

A. A single ladder; that takes two legs.

Q. Will you state what your cost figures are? Is this something you got up for the trial or is it part of your normal records in connection with cost finding in your business?

A. This was taken from our cost finding, was brought along by myself, and I made it up here.

Q. In other words, can you state whether or not finding your costs of production is one of the elements that goes into fixing your sales price?

A. Definitely.

Q. You have to know it?

A. Oh, definitely.

Q. Getting down to a two-leg unit, tell us what the labor costs, what the material costs, and any other element that goes into your costs under your cost-finding scheme for this adjustable leg.

(Testimony of Victor W. Meng.)

A. The welding on the—welding labor for welding the nut into the bottom of the leg amounts to three minutes and decimal [213] oh, four, five seconds (3.045), and the labor cost of that is eleven and a quarter cents.

Q. Is that for one leg or two?

A. That is for two legs. Machining and preparing and labor is ten cents and 10.5 cents.

Q. Does that include threading?

A. No, the threading comes in material; that is bought threaded.

Q. You go right ahead.

A. This makes a total cost of labor 21.3 cents. You have your overhead, a hundred per cent, is 21.3.

Q. What is overhead? Is that all of your shop management, administration and so on?

A. That is your shop management overhead.

Q. Does that include sales expense?

A. No, sir.

Q. All right.

A. The material cost is \$1.118, giving a total cost of \$1.60, and to that we have added 50 per cent mark-up or \$2.40.

Q. Your actual cost inclusive of all elements except sales costs comes to \$2.40 for two units?

A. That is right.

Q. Or \$1.20 for one unit?

A. \$1.20 per leg. [214]

Q. Per leg. Now do you sell the legs separately?

(Testimony of Victor W. Meng.)

A. Are you now referring to the caster or to the caster with the screw?

Q. You answer it as best you can. Do you sell the leg without the caster?

A. On an aluminum scaffold it is sold separately only for repair purposes, unless it is the type of scaffold that does not have this particular type of leg. Where it has the loose leg we sell them separately all the time.

Q. We will leave those out because we are limiting it to this type. So that they are sold for repairs as a separate item?

A. That is right.

Q. You quoted these prices. Do you have a substantial demand for the aluminum scaffold, that is, the portable scaffold, without the adjustable leg?

A. The demand for the aluminum scaffold without—did you say without the adjustable leg?

Q. Yes.

A. That will run about 30 per cent.

Q. By the way, where are these scaffolds made?

A. These particular scaffolds are made in Long Island City and also in Los Angeles.

Mr. Mellin: Where?

The Witness: Los Angeles. [215]

Mr. Mellin: Q. And where else?

A. Long Island City.

Mr. Bronson: Q. You were required, under usual discovery procedures that this Court provides, to answer certain interrogatories proposed to you by the plaintiffs in this case?

A. That is right.

(Testimony of Victor W. Meng.)

Q. And you did answer them and completed them and turned them over to counsel for filing?

A. That is correct.

Mr. Bronson: We would like to introduce as an exhibit in this case the answers to the interrogatories proposed to and answered by this witness. I will state the purpose of it. It only goes to a portion of it, Your Honor; and he supplied without request this data that I have secured by question and answer and by the last exhibit. And I would like the interrogatories in for that purpose.

* * * * * [216]

Mr. Mellin: If I may suggest, Mr. Bronson, why not offer a copy that you have in your file? I will agree that it may be put in in lieu of the other.

Mr. Bronson: I will supply that.

That is all of the direct examination of Mr. Meng.

Cross Examination

Mr. Mellin: Q. Mr. Meng, as I understood you to say, you sold these legs of this—you know the device you are charged to infringe here?

A. Yes, sir.

Q. Separately. Inasmuch as part of that assembly is part of this whole scheme, that is the nut and this a collar; would you explain to me how you could sell that assembly separately?

A. I think you will find in my testimony that I said that we sold the screw and caster separately for repair purposes.

Mr. Mellin: That is all.

(Testimony of Victor W. Meng.)

The Witness: But we do occasionally sell the upper part where it is welded directly to the leg.

Mr. Mellin: Q. No device of that kind has been shown here? A. No.

Q. As I understand it, up until about 1951—did you say you advertised before then, that you advertised these legs which we are complaining are infringed?

A. I will have to refer back to the date of that exhibit; that was the first time they were shown.

The Court: October 1950.

Mr. Mellin: Q. Is this the exact type of leg of which we are complaining?

A. The illustration, no, but the comments that I quoted before, yes.

Q. Actually the exact type of which we are complaining you did not put out until some time in the latter part of '51; is that correct?

A. You mean by that the shrunken size that you have there?

Q. Yes. A. That is correct.

Mr. Mellin: That is correct. That is all.

Mr. Bronson: That is all, Mr. Meng.

(Witness excused.)

Mr. Bronson: The defendant will rest, Your Honor.

Defendant Rests. * * * * * [218]

Mr. Bronson: I have a short motion and a memorandum of authorities. I thought if they are of advantage to counsel and the Court I would hand those in now after the jury is excused, just merely

anticipating the conclusion of the rebuttal.

The Court: Yes, you can.

Mr. Bronson: You can have them overnight. I will make service on both Court and counsel now.

The Court: That is all right. [219]

* * * * *

WALLACE J. S. JOHNSON

a plaintiff herein, was called as a witness on his own behalf in rebuttal, who having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, resumed the stand and testified further as follows:

Direct Examination

Mr. Mellin: Q. Mr. Johnson, you heard Mr. Meng testify yesterday to the effect that legs of the character of the patent in suit shown on Exhibit 8 were, because of the weight of steel scaffolding, unusable in steel scaffolding of the portable type. You heard that question and answer?

A. Yes.

Q. What have you to say to that; is that correct or incorrect?

A. Well, this type of leg mechanism under suit today could be applied to a scaffolding of any metal, either steel, aluminum [221] or otherwise.

Q. What is the actual mechanical thing that is the load sustaining part of the leg, Mr. Johnson?

A. The thread of the nut imbedded in the thread of the inner leg is what sustains the load.

Q. Would you look at Exhibit 12. I understand that was used with steel scaffolding?

(Testimony of Wallace A. S. Johnson.)

A. Yes, this type of leg is used with steel scaffolds for many, many years; that is the basic leg in this particular one, but I mean the type wherein there is a nut that threads on an inner screw and is called a screw jack.

Q. That is what——

A. Turning the nut raises the scaffold by pushing on the thread of this tubular leg.

Q. In that type of device of steel scaffolding what is the mechanical thing or element which supports the load?

A. The same thing as in the patent under discussion; in other words, the threads of the nut imbedded in the threads of the inner leg is what supports the load.

Q. So as I understand it, this threaded connection between the nut underneath here and the threads that support the load in Exhibit 12 were used in steel scaffolds as they have in here in the aluminum scaffold; is that correct? A. Yes.

Q. Mr. Johnson, some question has been raised as to the use [222] of a straight section of the inner leg in the patented device. Would you state to us the importance of that element in the combination, if it has any?

A. It is of vital importance.

Q. Could you demonstrate that for us, please?

Mr. Mellin: May he approach the scaffold, Your Honor?

The Court: Certainly.

(Testimony of Wallace A. S. Johnson.)

The Witness: A. This leg was a leg from Exhibit A,—

Mr. Mellin: 8-A.

The Witness: (continuing) —which has the cylindrical unthreaded portion. To best illustrate the importance of the unthreaded portion of the leg in relation to the nut and its use with the threaded portion, we have two legs here that are identical in every respect to the leg in Exhibit 8-A, the only difference being that they have no unthreaded portion.

Mr. Mellin: Q. You have two such?

A. Yes, two such legs here identical in every respect to the legs in the scaffold Exhibit 8, but they just do not have the unthreaded portion.

Q. Will you demonstrate it? And by this you can demonstrate the importance of the unthreaded portion, Mr. Johnson? A. Yes.

Q. Would you do it, please?

A. Yes. First, by way of comparison, it would be significant to point out that on this end of the scaffold Exhibit 8 we will [223] continue to have the scaffold supported by the legs which have the unthreaded portion within them. In other words, then, this leg, even in its extended state, there will be this unthreaded portion always in there extending up inside the outer leg.

Q. What is the effect of that?

A. The effect of that unthreaded portion in there is to cause the scaffold to be stable against side loads so that it won't buckle, and because of the

(Testimony of Wallace A. S. Johnson.)

telescopic or snug fit in there there is no shakiness or wobble in the scaffold even though the leg is extended a considerable distance. It is important from the fact that a man would not have to be interested there to know whether or not his leg is threaded out any certain distance. And if he is adjusting the type of leg in the case of this leg——

Q. ——and that is Exhibit 8 in the normal patented fashion?

A. Yes, that has the unthreaded portion in there. Let us adjust this leg. Assuming there is a load on the scaffold, as there would be if you were making this type of adjustment, as soon as he gets to the end of this thread as I have now done, he can't screw the leg out any further. When he realizes he has come to the end of it, he still knows that there is the unthreaded portion in there so there is no hazard involved in screwing this leg up or down. That we will have on one end of the scaffold. On the other end of the [224] scaffold we will take out the standard legs of the type we have in here and insert the other type of legs.

Q. That is one without the unthreaded portion?

A. Yes; they are identical in every respect; merely insert them in the extended position in the end of the scaffold so that they will replace the other legs (demonstrating). Now we have inserted them in a fully extended position with only a few threads in there to make the scaffold of relatively similar height to the other end.

It is possible in actual scaffold use with a loaded

(Testimony of Wallace A. S. Johnson.)

scaffold that since you can't see the inner leg from the outside, a man would not know how far it was extended, therefore the scaffold would appear to be the same; but if anyone were up on it he would notice extreme shakiness and wobble of the scaffold, because you see actually the legs are just held by the threads and there is no stiffening portion up inside to make it stiff. So assume there were men actually up on this scaffold and this end of the scaffold as you see it was slightly low compared to the scaffold on the other end. The logical thing would be, since you can't use the quick adjustment under load, the man up above might yell down to his partner and say, "Adjust this end of the scaffold an inch or so, will you, Joe?" He will start to turn on this leg thinking that he is raising the scaffold. As he turns on this leg the thing will just fall right out on him [225] because the man up above may be shifting back and forth. That is because none of this can be certain with this type of leg when it will actually fall out, and the man won't know it is going to fall out because he has no means of seeing within the structure, even though this is screwed in tightly or in part.

Bear in mind this portable type of scaffold, where there is a single tower moved from position to position, as soon as they are working awhile, standing awhile, the next thing is to move it to the next section. Without this unthreaded portion this may be secured by just a few threads or it may be out and he doesn't know it as unthreaded. So when

(Testimony of Wallace A. S. Johnson.)

they start to move the scaffold from position to position the leg will either fall out or the leg will buckle, thereby causing a serious accident on the scaffold.

Mr. Mellin: May I offer those modified legs as Plaintiff's next in order?

(Thereupon scaffold legs marked Plaintiff's Exhibit No. 19 and received in evidence.)

Mr. Mellin: You may cross examine.

Cross Examination

Mr. Bronson: Q. Did you not observe in Court yesterday the Uecker patent with the terminal numbers 114, a leg of a scaffold? [226]

A. Yes, I recall that patent.

Q. It has got the same thing as yours, hasn't it?

A. No.

Q. Do you remember the date that it was issued?

A. Since there were two, may I see a picture of the one of the two Uecker patents to which you refer?

Q. 1938. This is the one that is up there; it is the smaller picture. We are talking now about this smooth, slideable part which you say prevents wobbling. Doesn't this one have a smooth slideable part at the top of the threading that prevents it from being unthreaded beyond that point and prevents wobble. This being a solid piece, Mr. Johnson, from here where I am pointing up to the top, and it is cut in the middle to which there is an internal spring attached and it has a long, sliding smooth

(Testimony of Wallace A. S. Johnson.)

top part to the inner member that fits snugly on the interior of the tubular outer member.

A. Yes, there is such a cylindrical portion in there; that is right.

Q. Were you present in court when Mr. White read from Mr. Uecker's patent in which he claimed that he got the same snugness that you have been at pains to point out? You remember that part of Mr. White's testimony when he read from the Uecker patent I have just shown you, number 2,203,114 where the same claim was made 16 years ago by Mr. Uecker; do you recall it or not? [227]

A. I recall discussing certain portions of that patent, yes.

Q. What I am bringing out, if you agree with me, is that 16 years ago Mr. Uecker made the same claim for that portion of his device that you are making for that portion of your device. Can you answer that yes or no?

A. Well, I will answer it no, but I have to qualify it. I am not trying to hedge on your question. It doesn't have the same function there except by itself. By itself it is true that the cylindrical portion has a snug fit within the outer portion by itself, but that is the only relationship in which the two devices have the same function.

Q. I am not going to split hairs; I will just read it so it will be clear. Column 2 of the Uecker patent at line 27:

"The collar 27 thus cooperates with the sleeve

(Testimony of Wallace A. S. Johnson.)

15 to form a unitary rigid column, and prevent wobbling of the screw 14 within the post."

You have that in mind?

A. That is one of the features of the unthreaded portion.

Q. That is one of the features of the Johnson patent, isn't it?

A. Yes, one of them; one of several.

Q. And his works as he describes it, as you understood it and your works as you demonstrated in court?

A. In respect to that one feature, yes, they are the same.

Q. I don't know whether it is important or not, but I will [228] just cover it. You referred to some testimony of Mr. Meng here yesterday about steel scaffolds. As I understood it—I could be wrong and you will be the first to correct me—the adjustment, the rough adjustment, or quick adjustment as it has been called, requires the lifting of the scaffold, does it not—somebody has to get under it and either raise it or let it down before that adjustment is going to be made, and it requires the strength of a man; isn't that right, Mr. Johnson?

A. Yes.

Q. There is one down on the Bank of America, I just passed it, 13 stores high. Those are scaffolds that are put together, are they not, piece by piece?

A. Yes.

Q. And they are taken down, demounted, and carried away in trucks; they cover 80-foot front-

(Testimony of Wallace A. S. Johnson.)

age 10 stories high, where they are putting on new stucco or paint; right? A. Yes.

Q. They have to be made out of steel because this metal won't stand that weight; isn't that true?

A. No; aluminum of this type is actually stronger than steel in this particular structure.

Q. If I can't get that admission, at least you only apply to portable scaffolds?

A. The principle is applicable only to portable steel [229] scaffolds and portable aluminum scaffolds, and the type that you have mentioned are static and not portable in any sense of the word.

Q. Assuming that the man who owns the steel scaffold may have to use it on a one-story building one day and a ten-story another, are you contending seriously that in a practical sense this has any application to steel scaffolds which are used in that way?

A. Yes, I am contending that they would, because the steel scaffolds are made in frames just like that; perhaps not so many rungs, but they are made in frames three feet high and four feet high and five feet. Many scaffolds of the modest type have only frames consisting of two steel beams with braces between them, and those do not exceed a weight which a man could readily lift with his own strength and use this type of short leg.

Mr. Bronson: All right, that is all, Mr. Johnson.

Mr. Mellin: The plaintiff rests, Your Honor.

Mr. Bronson: I have a motion to address to the Court.

The Court: Does that conclude the testimony?

Mr. Mellin: Yes, Your Honor.

Mr. Bronson: Yes, we have rested, Your Honor.

The Court: Do you wish me to excuse the jury to hear your motion?

Mr. Bronson: Yes, I think so, Your Honor. I presented [230] the motion in written form, but it may be some response will want to be made to it, and I will make it on the record.

The Court: Well, would you take the jury for the recess, please?

(Thereupon the jury retired from the courtroom, and the following proceedings were had out of the presence of the jury.)

Mr. Bronson: At this time, if the Court please, the defendant, the Patent Scaffolding Company, a corporation, makes its motion that the Court direct a verdict in favor of the defendant and specifies as grounds of the motion:

First, that the evidence is insufficient to constitute a cause of action for infringement or for any other relief against the defendant.

Second, that the issue of validity of Patent Number 2,618,496 is one of law exclusively and not a question of fact for the jury.

Third, that the invention of plaintiff described in Letters Patent as previously specified constitutes a mere aggregation of prior art and does not constitute invention.

Fourth, that the claim of the patent in suit constitutes an unpatentable aggregation of elements and not a patentable combination of elements.

Fifth, that the claim of the patent in suit embodies an aggregation of mere mechanical skills and not patentable [231] invention.

Sixth, that there is no patentable invention in the scaffold leg set forth in the claim of the patent in suit over cancelled claim 14 set forth in the file wrapper and contents, which was a cancelled claim.

If the Court please, I presented to Your Honor merely anticipatory of this motion a written motion which, if agreeable to the Court, I would like to ask be filed.

The Court: Very well.

Mr. Bronson: I also presented at the same time a memorandum of points and authorities in support of the defendant's motion for a directed verdict. I don't know whether your Honor makes memoranda of points and authorities a part of the record or not; but I mention it now, because in view of that brief and one previously handed to Your Honor which covers many issues, I do not choose to make any further argument in support, and will let those writings stand in support of the verbal argument in defense of this motion.

The Court: Mr. Bronson, before you sit down, let me say that I have looked over these matters in the evening, and I have no particular difficulty with the question of law presented because it is not a particularly difficult one as patent cases go except insofar as it is always difficult to determine the validity of a so-called combination patent, as the patent lawyers will understand. And that problem I have [232] had not infrequently. That is a far

more difficult problem for the men who write the decisions in the Appellate Court, because some times from lack of practical experience they are not aware of the very difficult question of deciding whether or not that question is one of fact or one of law, which is the main problem that I think is involved here.

I was wondering if you had any theories or views as to whether or not the issue presented is one of fact or one of law.

Mr. Bronson: We contend, as the motion indicates, that it is purely one of law. We saw that, at least to our satisfaction, before there was a word of testimony here.

If these samples of prior art, in which I am sure there will be an admission, were contained in an aggregate in the Johnson patent, worked in any different way or got any additional results, there would be something to discuss.

But you can take these little models that have come in here, and the larger ones, and demonstrate in contrast with at least some of these inventions, that they worked exactly the same, they don't add any more to the Johnson device than the sum of what they contain within themselves. Each works the same as far as operation goes, as far as its function goes, and as far as its resulting aspect goes.

So, as I understand the law, that is what constitutes an unpatentable aggregation; but that on the contrary, had you [233] evolved out of bringing these items together some new operations, some

unexpected, some surprising result that constituted more than the sum of the parts, then you would have something to send to the jury. And I can't see it in this.

The Court: What I particularly had in mind—I didn't mean to interrupt you——

Mr. Bronson: That is quite all right.

The Court: I am not so much concerned with the patentability, the validity; the question for ultimate determination is this: What are the facts upon which the question of validity is to be determined? It consists of the patent in suit with the presumption of validity that traditionally goes with it, and then on the other hand there are the prior art patents. So we have the prior art patents against the patent in suit. Is there any other fact that we have in the case? We have no expert testimony in the case. There is no one who has testified particularly as an expert upon which any conflict of evidence results or any conflict of inferences from the evidence results.

So we only have those prior patents plus the present patent if we eliminate the explanatory matter which I think presents no substantial conflict as to the question of validity; it is merely evidence that is explanatory of what is in the patent. [234]

Now when you have prior patents and you have a patent in suit and they are brought here and they are presented and they are examined and there is a conclusion to be drawn from them, is that a question of law or is that a question of fact? I

have never seen any judge write any opinion on that, except that the Appellate Court will say "Well, the judge below had the models and patents and so forth, and now they are up before us, so we can decide that question just as well as he can."

But essentially I have never seen any standard announced according to which such a decision could be made. And I don't think there could be one as such, because I think that is something that cannot be decided as a matter of theory as to whether or not a question is a question of fact or a question of law.

Now is that a question for the jury? That is the way I look at this case, and that is why I was anxious to get your views on it. Is this a case where the jury as the trier of the fact, can look at the patents, compare them with the patent in suit, and say "Well, it is our conclusion that all that the plaintiff has done is aggregated previously existing elements and that it does not constitute invention," or to the contrary, that "We have examined these other patents and we have come to the opposite conclusion as against the patent in suit?" Is that a question of fact or is that a [235] question of law?

Mr. Bronson: Well, Your Honor poses the question and I will do my best to answer it.

In every case that has gone in recent years to the Court of Appeals of this Circuit and every recent case in the Supreme Court where they held the patent invalid as a matter of law, you had the

same presumption of validity which they necessarily held to be dispelled.

Some of the cases say that it weakens the presumption when you show that the prior art that is really pertinent wasn't even considered in the Patent Office; some of them say it is destroyed. But the thing that I find out from reading cases like the Atlantic & Pacific Tea Company case, the case of Himes against Chadwick up here, and the Quick-Set case which is as recent as this—they took the presumption that goes with the issuance of letters and simply dispelled it as they had to do, as a matter of law, holding that in a case where it is a clear matter that doesn't need any more than a view of a picture of it or an explanation of how it works, then it does become a matter of law.

I don't know whether that answers Your Honor's question or not.

The Court: You mean by that what they have really decided is that under circumstances such as that the question of validity is never a question of fact, really. [236]

Mr. Bronson: That is exactly what they said. They can't have said anything else when they render a decision as they did in the Atlantic & Pacific case. That is the most recent and the rationale of the court is set out there in perhaps a little clearer language than in some of the others when they discuss aggregation against a mere combination, and they said when they used the term—it is nothing but words—a patentable combination is something that arrives at new uses that

exceeds the uses, the operation and the result in the prior patent. Here I say there is nothing left for imagination. That is the burden of our case here. You can see these things operate. We have brought them in in pictures, we have brought them in in models. And I think Your Honor, there isn't a single question of fact left under those decisions. That happens to be the state of the patent law today under the announcement of the Supreme Court.

I hope I have answered it. I am not going to labor it any further. But that would be my answer. It would do no good to read long citations from those cases; Your Honor has read them long before I did and you know them better, so I will omit that.

The Court: I asked you to get your view of it, because it would seem to me that although I have submitted the question of validity along with infringement to a jury before, the only question really in these cases, so far as I have been able to [237] see in most cases, anyway, that calls for the trier of fact to act is the infringement issue.

In that respect in this case if there is validity of the patent, I think the Court would have to instruct the jury that there was infringement, because I do not think that reasonable minds could differ that there is any difference between the two devices. But on the question of validity, I find it very difficult to see any question of fact involved, and that is why I wanted to get your views. I would like to hear from Mr. Mellin.

Mr. Mellin: If Your Honor please, I think there is a very great question of fact here, and that is the fact of invention.

Now as I understand the law, and I think I have been involved in every jury case except one that has been presented to this court in the last few years, starting with the Lyophile case before Judge Yankwich, which was the first, and terminating in this one—the only one in which I was not involved was that one before Judge Harris, and that one was reversed because there was an obvious lack of invention. The Court could look at that and probably decide there was no invention without any prior art.

The Court: I think you were in this Oxnard case.

Mr. Mellin: That is correct, Your Honor.

In the Lyophile case there wasn't any dispute as to what [238] was in the prior art. The process there was the lyophilizing process which was freeze-drying. That is the same thing, as proved in court, that happens when you put the washing on the line; when it is put out in freezing weather it freezes and the water goes off in the form of vapor by natural processes. And what they did was to dry penicillin by artificial freezing and artificial heat. That was presented to the jury by Judge Yankwich as a question of fact to determine whether or not, in view of what had been done before and what had been shown in the patent, whether or not in light of that there could be something accomplished

or a discovery that was in addition to what would occur to one skilled in the art.

The question of law as I understand it in a patent is one—and I am under no disagreement that the Court is just as able to read the prior art patents and to evaluate them and apply them as we patent lawyers; I mean that isn't the question involved,—the question is: Does the Court have to evaluate that prior art? Could two reasonable men reasonably come to a different conclusion as to whether or not the Johnson device, in view of this prior art involved something more than mechanical skill? That is the question. That isn't a question of law.

However, if there was a prior patent, as the cases say—if there was a prior patent on a scaffold leg where these [239] concepts were shown except for some minor differences in dimensions on material, where two reasonable men couldn't possibly differ on whether or not that step in advance was one beyond the skill of the calling, then it is a question of law. But where the Court has to weigh the evidence to arrive at that, then that is a question of fact.

The Court: What is that difference?

Mr. Mellin: The difference is when two reasonable men couldn't say it is beyond the skill of the calling.

Now look at this case. Here we had a patent lawyer on the stand who, when *we* was asked, had to say this, he had to take one patent on a tire stem, a split nut holding a tire stem on a tire rim,

and he said that is somewhat similar in construction; but then he had to go to find the Countryman patent and you find part of its operation; then you go to a third patent to find another part of its operation, and a fourth patent to show the general application to a scaffold or a table unit.

The question of fact is this: There isn't one patent that they could point to that showed the entire combination except for the specific embodying of one part and that part alone, Your Honor.

This same argument was raised before Your Honor in the fish case. There it was admitted conveyors were old discs that hold things were old; that eviscerating of fish by vacuum [240] was old. There were only three little narrow claims in that patent and only one sued on. There was a case where we had the same argument; they did nothing but just vary them and vary the use of them. That is what has been done here.

But where in this prior art has it been shown to the Court that there was any concept of a leg in one combination in which each part contributed to that complete ultimate result that is shown here?

The Court: I thought afterwards that I was in error in the Oxnard case in submitting the validity to the jury.

Mr. Mellin: The Circuit Court of Appeals did not think so because Judge Bone says that, "in effect appellants would have this court substitute itself for the jury, by reevaluating the evidence." This court has previously held that issues of the char-

acter here presented are questions of fact. And I am reading from that case.

I think there was a question for the jury involved there, Your Honor, and I think the question of fact for the jury there is precisely the one here. I am reading from page 659 of the Oxnard case, Your Honor. And Judge Bone in that case also said that,

“With respect to the result produced, it is not essential that a wholly new result but is sufficient if an old result is effected in a more facile, economic or efficient way.” [241]

Here we have a new result. Not one of these patents according to their own testimony, effected the result that we obtained by this one combination.

Counsel has stated that it is a mere aggregation. Aggregation doesn't come into being because each of the parts are old. Aggregation means, for example, where you use old parts but the two do not contribute to one better result.

I read from that case, Your Honor, in Note 9, the second part of it.

In the Faulkner vs. Gibbs case, that was another case where the——

The Court: Of course, what Jone Bone was referring to there was the fact that it was too late to urge about that the matter should have been passed on as a matter of law because it was not urged below.

Mr. Mellin: That may be so, but his statement there——

The Court: His statement is as to substantial

evidence, which refers more to the infringement question.

Mr. Mellin: But to reevaluate the evidence.

In the *Faulkner vs. Gibbs* case, which wasn't before a jury, it says:

"The question of whether or not a new and useful combination is the result of mere mechanical skill or of inventive faculty is one of fact."

Now, I insist, Your Honor, that unless two reasonable men [242] like Your Honor couldn't possibly come to—that is, if a reasonable man couldn't possibly come to a different result, then it is a question of law; but if two men could reasonably differ as to whether something new and valuable in excess of that of the mere skill of the calling was provided here,—I insist that two reasonable men could come to a different opinion.

The Court: But, Mr. Mellin, what is the evidence on the subject of whether or not this is a result of a workman's knowledge or something else?

Mr. Mellin: The evidence is this, your Honor: Here it is shown that portable scaffolds have been made for many years; but that until this was produced portable scaffolds did not come into wide use. And the evidence of twenty thousand of them since that time, plus what the defendant has made, certainly indicates that.

Now what has happened? This is an invention not of a high order, as the courts call it; it is not the production of a sewing machine or something of a startling nature such as that. It is what the courts call of a secondary nature but still protects.

What happened? The defendant was making the old type. They had all the prior art before them. They were making the old type. They went along for a year or two. I think by inference it can be drawn from the evidence they couldn't [243] sell their scaffolds without this leg. And so what did they do? They didn't go and borrow one from the prior art; they deliberately copied this precise leg. By their own tribute it must be something new. The evidence is that it is one of the oldest and largest scaffolding companies in the industry.

The Court: Of course it was new, there is no question about that. But was it novel?

Mr. Mellin: If it was new, it would be novel, wouldn't it, Your Honor?

The Court: All right; it could be new in the sense that a workman had devised something that is new, but it still wouldn't be patentable.

Mr. Mellin: Well, all right, we will go to the word "patentable". Here is what happened? The testimony is that there isn't any one patent in the art which can be substituted for it. And Your Honor yourself and this court has many times said that you can't take two or three prior art devices, scramble their parts and come up with a new unit combination that produces something new and say it is anticipated by these four prior devices. And that is what we have.

We had a patent lawyer on the stand who knows the rules of law. Yet what he had to do, in order to try to anticipate the patent, was to take a device, part of the construction of one patent, part of the

mode of operation of another, part [244] of the mode of operation of a third and a fourth before he could say, "when you do all that, you find it." As I understand the rules of law on combination, you have to find in one patent the general combination which operates in substantially that mode of operation, then find the parts to be old; not just a part from here and a part from there and make a mythical device.

The Court: Where do you get that rule? I have never heard that one.

Mr. Mellin: I think unquestionably that is the law, Your Honor.

Mr. Bronson: Where do you find it?

Mr. Mellin: Let me argue my case, will you, Mr. Bronson.

The Court: A workman can find his elements any place, can't he?

Mr. Mellin: Oh, yes.

The Court: Then when he does that, if he makes some new device, the question then is, isn't it, whether or not these things are well enough known so that all he has done is take advantage of his general knowledge as a workman to put together well known devices or methods, or whether or not his using of the well known devices is something that is not the result of the ordinary activity of the workman and the artisan in his field, but goes beyond that. That is that strange line that they have set. They said nobody can define [245] it accurately. A lot of words have been used about it,

but you take one step over that line, and you take off the workman's cap and put on the inventor's.

Mr. Mellin: That is right, Your Honor. Where in the prior art does the concept of the finding that in a scaffold leg you could make the bottom part of the leg in a fashion that has been done, adding and making use of that function for a quick and a small adjustment at the same time preventing swaying and preventing accidental tipping over? Where is it in the prior art? It isn't there.

The Court: I agree with you it isn't there. The mere fact that something has considerable value and is utilitarian, it is useful and so forth, it is created, doesn't necessarily make it patentable.

Mr. Mellin: That is true, Your Honor, but——

The Court: It doesn't become patentable. It is just a question of, what did the man have at his command when he created that thing? Was he just a workman mixing his paints getting a new color, or was he suddenly adding something entirely new to the field of color? That is the question.

Mr. Mellin: We say we added something new to the field of scaffolding. You can't take a nut from a tire stem and add it to a jack, neither one of them having the same mode of operation of producing a result, and then take a table leg that is nothing like it because it is telescopic only, and [246] say that all you have to do is to put those in the pot and come up with the invention. That is where the question of fact comes in.

On the rule of law, Your Honor, I have before

me, *Bates vs. Coe*, 98 U.S. 31, and I tell the Court that this is the regular rule. It says this:

“Where a thing patented is an entirety consisting of a single device or combination of old elements, incapable of division or separate use, respondent cannot escape the charge of infringement by alleging or proving that a part of the entire thing is found in one prior art patent or printed publication or machine, and another part is found in another prior exhibit, and still another part in a third one, and from the three or a greater number of exhibits, draw the conclusion that the patentee is not the original inventor of the improvement.”

That is the regular rule. Now that is exactly what the evidence shows here. They had to borrow it all. We have a device that has a new mode of operation in itself; it has produced new results in the scaffolding field, and it is substantially different from any prior patent shown. We say that it is inescapable that that is a question of fact as to whether or not, in view of that evidence, that the production of this [247] device did not involve the inventive capacity.

The Court: Let us assume that that is right and the Court is going to tell the jury in this case: “Now, members of the jury, you are going to have to decide in this case whether or not this is patentable; and you are going to have to decide it on the basis of whether you find from the evidence that this was the result of the ordinary skill of the mechanic or artisan or whether it has crossed over the line and it has become what I am telling you

constitutes invention. Members of the jury, you are going to have to decide that question, as to whether or not this is the work of a workman?"

Now what is the jury going to decide that question on?

Mr. Mellin: The jury, under the proper instructions——

The Court: It is going to study all of these prior art devices.

Mr. Mellin: Well, I think the jury——

The Court: They are not in dispute; these are all patents. They have all been issued. Nobody disputes particularly what they in themselves mean. But the question the jury is going to have to deduce is whether, looking at all of them, that shows whether or not there was a result to just the workman's ability in his field or whether it was something beyond that. That is what the jury will have to decide in this case.

Mr. Mellin: In other words, they have to evaluate that [248] evidence as to whether it was only skill or whether it was something beyond it, under proper instructions.

The Court: And beyond that they have to evaluate in that connection the prior art patents which have been explained, plus the patent in suit.

Mr. Mellin: That is correct.

The Court: They are going to have to read those patents——

Mr. Mellin: They don't have to.

The Court: So the jury is going to sit as sort of patent officers or examiners in the case.

Mr. Mellin: Well, they have to evaluate it, Your Honor; and if Your Honor evaluates and weighs the evidence, then under our Constitutional rights you have deprived us of a jury trial on that question.

The Court: But the question is, is that a question of fact?

Mr. Mellin: The courts have said so. I can't say more. It is a question of fact. It is a question of evaluating the evidence and that is what this court shouldn't do is to weigh the evidence. Now if there is no evidence to weigh to determine that question of fact of whether it went beyond mechanical skill or not——

The Court: Don't you see that that is the problem that has always confronted the higher courts? That is why they have talked about questions of validity being questions of [249] law all the time, is because when you have got only the patents before the trier of the fact or law in the matter, what question of fact have you got?

Mr. Mellin: It is the jury's province to weigh that evidence.

The Court: There is no conflict on the subject. Here are two documents, Document A and Document B. You want the jury to read Document A and you want the jury to read Document B and say what effect Document A has on Document B.

Mr. Mellin: I don't agree with Your Honor, if I may disagree with you.

The Court: Certainly.

Mr. Mellin: Here is a jury that is familiar with

what devices were put out before. As Mr. White testified, the use of split nuts is old. Now if you go on Your Honor's theory, there wasn't any invention in all of those 15 prior patents.

The Court: There might be invention, but wouldn't it be a question of law rather than a question of fact?

Mr. Mellin: I agree with Your Honor in a question of fact it is the weighing of the evidence; but they must decide what the courts have said is the factual question: Is it invention or beyond that or not?

The Court: The question of whether it is a factual question depends upon the circumstances of the particular case. [250] I can't agree that there is any rule. If that is the case, why, then there would never be any questions to be determined by a court at all in any case. If the rule is that a question of infringement or a question of validity is a question of fact, then every time there is a case, no matter whether it is a question of fact or not depending upon the circumstances, it would have to be held to be a question of fact. That is not the law.

Mr. Mellin: No, Your Honor. Your Honor, maybe I didn't make myself clear. Now you take in the Himes case, there was a claim with broad language. There was a prior art device in which that language could be applied word by word. The question of validity depended upon that, and the trier court took it away from the jury N.O.V. on the ground that under the law when the claim

reads on that prior thing, it as a matter of law is invalid.

Now if one of these prior patents had shown all of our combination except maybe for the specific construction of one piece two reasonable men couldn't agree that a skilled mechanic could make it, then it is a question of law. But I think that Your Honor deciding a case of this sort, where you must weigh the evidence and must decide that factual question as to whether or not it went beyond the skill of the calling or whether it was a step in advance, should submit it to the jury under proper instructions. If you don't, then [251] I think Your Honor has deprived us of a jury trial.

The Court: If you had a case in which there was evidence or maybe a dispute as to what constituted the ordinary skill of an artisan in a particular field you might have a possible question of fact. But all you have got in this case is the patents; you haven't got anything else.

Mr. Mellin: That is right, Your Honor, and we have the testimony that it has a mode of operation that none of the prior art devices have and a construction that is not found in any of them.

The Court: How can it be said that the jury is going to do anything else except sit as specialists to determine the meaning of these various patents?

Mr. Mellin: Well, the court has to sit that way, Your Honor.

The Court: That is because the Court sits as a matter of law the same way as the Patent Office sits. You are now talking about a jury trial.

Mr. Mellin: That is correct, Your Honor.

The Court: And a question of fact.

Mr. Mellin: But I mean——

The Court: I don't see that it deprives anybody of any constitutional rights in a patent case when all that the jury is going to be called upon to do is to interpret the meaning of the patent, and that is a hard enough job for a judge, [252] let alone bringing in twelve people from the street.

Mr. Mellin: Here it has been shown that nuts are old, tubes are old and what have you are old, and this is old. The simple question to decide is the question of fact of whether that being old, did this new concept with its new mode of operation and construction go beyond the skill of the calling on which this Court has instructed the jury?

And I think this type of defense where you find a nut in one and this and that, is just tantamount to saying, "All the words are in the dictionary, so it took no skill to write the Gettysburg Address." I don't see any difference.

The Court: If that were all there was to it, the argument would be good. The higher courts have laid down different rules with respect to these matters.

Mr. Mellin: Yes, the standard of invention that we ask to be applied.

The Court: You are familiar with what they have said in our own Ninth Circuit Court of Appeals, speaking colloquially, of these so-called combination patents, and there isn't too much way left

open for a claim of invention when you put these older elements together.

Mr. Mellin: Well, the Circuit Court of Appeals sustained the Bradley patent, it sustained the Lyophile patent, and it sustained the *LaBrea* patent, in which case the Court said—and I am talking about modern cases, Your Honor, here is [253] what our Circuit Court said in——

The Court: Before you read that, let me say to you, Mr. Mellin, you wanted a jury trial in this case.

Mr. Mellin: That is correct.

The Court: If I were to give this matter the attention that it required, I would dismiss this jury for a month and consider the case as I would consider any other patent case.

Mr. Mellin: All right, Your Honor; we will accept that.

The Court: I mean these are not cases for a jury. And I don't say that in the sense that you are not entitled to a jury nor am I saying anybody should not have a jury trial in a case, because I am a very loud and articulate exponent of the jury system. But in a patent case you have the wealth of material and experience and decisional law on the subject of patents that a judge can resort to in determining the many difficult patent questions that arise, but which a jury cannot. You bring 12 people into the box and they have to decide the matter. No judge with any conscience would let the decision of a jury stand no matter which way it

goes in a patent case unless he is satisfied it is right. Isn't that true?

Mr. Mellin: Well, that would be true in any case, Your Honor.

The Court: So it is just a waste of time in most cases for juries. [254]

Mr. Mellin: If Your Honor please, I would like to——

The Court: You had a jury in the Oxnard case. Why you asked for a jury in that case I don't know. I thought it was a very clear case and I would have decided it just the same way myself, and it didn't add anything at all that there was a jury drawn in the case.

Mr. Mellin: Your Honor, may I point out to Your Honor this——

The Court: I don't mean to be personal or cranky.

Mr. Mellin: I understand, but may I point out one thing to Your Honor: We were severely criticized in Judge Roche's court by inference for having a jury. The reason for it is this: We tried a case before another inexperienced judge in this court on a patent case, and we tried it for ten days, in which the issues weren't as involved as these. We tried this case in two days. And we have found that a judge on the bench knows that he is not going wrong leaving in evidence when he is trying it for himself so all of it goes in. And we were three or four days before we got to the patent. Now there was a 10-day trial against a 2-day trial with the same issues. These patent trials are getting

so that a client can't afford them before a court; they are getting too involved.

The Court: You mean you can't try a case before a court as quicky as you can before a jury? [255]

Mr. Mellin: I tell Your Honor that in all sincerity.

The Court: Most of the lawyers say differently.

Mr. Mellin: We would before Your Honor.

The Court: I never had many long trials in patent cases.

Mr. Mellin: That is right, but you are speaking of yourself, Your Honor. Some of the other judges aren't as experienced.

The Court: Well, that isn't a personal matter.

Mr. Mellin: I know that.

The Court: There is no omnipotence in connection with the matter. Other judges try patent cases just the same.

Mr. Mellin: No; there are judges in these courts that haven't had the experience of your Honor and counsel inveigles them into just crowding the record. They don't in jury cases because the court watches it. We understand that the judge is behind the jury; if the jury makes an error the judge can correct it. But the jury trials have cost about a third of what the court trials have cost over the experience of many cases.

The Court: I would like to give consideration to the question in this case as to whether this constitutes invention or not, and I would like to give it a little more study. There are a lot of exhibits in the case. I can't pretend to have examined them

except only from the point of view of ruling on the admissibility of evidence so far. That is a [256] question, if I were trying the case, I would want to give a little more thought to. So, therefore, I don't think there is much in the point that there is a question of fact involved in this case at all, because I feel that I would have to give consideration to it if it goes to the jury or not. It is just that much of wasted time-consuming effort. If this patent is valid, then the plaintiff is entitled to a judgment because I think as a matter of law there is just no question about there being infringement. It doesn't take a Philadelphia lawyer to see that that is so. Counsel haven't made any point about that. This case depends upon the validity of the patent.

Mr. Mellin: Completely, Your Honor.

The Court: And therefore I think it is a matter that shouldn't be decided right off the bat.

Mr. Mellin: They have filed a memorandum. May we be heard in the same fashion then, Your Honor?

The Court: I wouldn't be prepared to grant a motion for a directed verdict; but I would be willing to grant a motion that would have the effect of holding that this is a question of law as it stands now. And there might be a factual question if it were determined that the patent was valid as to the amount of damages for infringement. I don't know how that would be reachable.

Mr. Mellin: If the Court once decides—— [257]

The Court: Taking it away from the jury——

Mr. Mellin: If the Court once decides——

The Court: Now, Mr. Mellin, I am not looking for any work; I have got lots of cases.

Mr. Mellin: I understand that.

The Court: A lot under submission. But if you want to waive the jury and let this case be determined in the ordinary way, I will do the best I can with it. I will have to do it anyhow.

Mr. Mellin: May we have a recess so that I can consult with my client?

The Court: All I am doing is asking for a little extra work.

Mr. Mellin: I understand, Your Honor.

The Court: Suppose we take a recess now.

(Short recess.)

Mr. Mellin: If Your Honor please, in view of the Court's suggestion, and with the Court's approval, plaintiff will waive the jury providing, however, that the Court will take under submission all of the issues in the case including that of damages.

The Court: Is that agreeable to you?

Mr. Bronson: Well, all of the issues in this case are before the Court on the pleadings. As I understand the effect of counsel's waiver it is the same as if we had tried [258] the case on this record before you right up to now and we have all rested, and it is the same as if we had tried the case before you.

The Court: You mean as if the case was now submitted to the Court?

Mr. Mellin: That is correct.

Mr. Bronson: Yes.

The Court: For decision.

Mr. Mellin: That is correct.

Mr. Bronson: And this doesn't affect either party's right, in view of any action the Court may take, to take any appeal or anything like that for either side; it is just the same as if we tried it before the Court.

The Court: I wouldn't have any hope that whatever decision I make would go free from appeal. No, I wouldn't. Well, are you both satisfied to do that?

Mr. Mellin: Yes, Your Honor.

Mr. Bronson: Yes, Your Honor.

The Court: I feel no matter what I do with the jury, if I submitted it to the jury I would have to pass on it anyhow. So it isn't going to make very much difference. I hope that nobody is going to feel badly about it because you have waived the jury. And I just want you to know that to be conscientious about it the Court would have to pass on it anyhow. [259]

Mr. Bronson: Yes.

Mr. Mellin: That is correct, Your Honor.

The Court: Bring the jury in.

Mr. Mellin: If Your Honor please, may we brief it?

The Court: Whatever you want to do. The main question is——

Mr. Mellin: The question of invention.

The Court: ——is the question of invention. And it is a somewhat close question. I think under the

state of the law the burden is more on you in that regard. [260]

* * * * *

The Court: Members of the jury, the lawyers have decided that this is too nice weather to keep you working on such an intricate problem as this. So they have decided by agreement that the case will be submitted to the Judge instead of to the jury. That will relieve you from your [261] obligations to have to hear and decide this case. So you are therefore free to go now. You may be dismissed.

* * * * * [262]

[Endorsed]: Filed December 2, 1954.

[Endorsed]: No. 14617. United States Court of Appeals for the Ninth Circuit. Up-Right, Inc., a corporation, and Wallace J. S. Johnson, Appellants, vs. Patent Scaffolding Co., Inc., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: January 12, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14617

UP-RIGHT, INC., a corporation, and WALLACE
J. S. JOHNSON, an individual,

Appellants,

VS.

THE PATENT SCAFFOLDING CO., INC., a
corporation, Appellee.

APPELLANTS' STATEMENT OF POINTS

Come Now, Appellants herein, Up-Right, Inc., a corporation, and Wallace J. S. Johnson, an individual, and make the following concise statement of the points on which they intend to rely:

1. The Court erred in holding United States Patent No. 2,618,496 issued November 18, 1952, invalid and void.

2. The Court erred in not holding United States Patent No. 2,618,496 issued November 18, 1952, good and valid in law.

3. The Court erred in not holding that Defendant within six years last past, infringed United States Patent No. 2,618,496.

4. The Court erred in holding that the Plaintiffs were not entitled to recover damages from Defendant.

5. The Court erred in not granting the relief as prayed for in the Amended Complaint on file herein.

Dated: January 21, 1955.

MELLIN, HANSCOM & HURSH,
/s/ By JACK E. HURSH,
Attorneys for Appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed January 21, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated by the parties hereto through their respective council that only nine (9) copies of Book of Exhibits be printed and bound in the above identified appeal, said Book of Exhibits to contain plaintiffs-appellants' Exhibits 1, 4, 5, 13, 14, 15, 16 and 17 and defendant-appellee's Exhibits D, E, F, G, H, I, J, K, L, M and N.

Dated: February 18, 1955.

/s/ MELLIN, HANSCOM & HURSH,
/s/ JACK E. HURSH,

Attorneys for Appellants

/s/ C. P. GOEPEL,

/s/ E. W. BRONSON,

/s/ J. E. TRABUCCO,

Attorneys for Appellee

[Endorsed]: Filed Mar. 1, 1955. Paul P. O'Brien, Clerk.

No. 14,617

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UP-RIGHT, INC., a corporation, and WALLACE
J. S. JOHNSON,

Appellants,

vs.

THE PATENT SCAFFOLDING Co., INC.,
a corporation,

Appellee.

**BRIEF ON BEHALF OF APPELLANTS,
UP-RIGHT, INC. AND WALLACE J. S. JOHNSON.**

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FILED

MAY 26 1955

PAUL P. O'BRIEN, CL

Subject Index

	Page
Statement of the pleadings.....	1
Jurisdiction	2
The parties	2
Concise abstract or statement of the case.....	3
The issues	5
Specification of errors.....	6
Argument	8
(A) Summary	8
(B) The facts	10
(1) The state of the portable scaffold art at the time of the invention.....	10
(2) The appellee's tribute to the invention.....	17
(3) The immediate and widespread success of the in- vention	18
(4) The prior art patents relied upon are in fact insufficient to negative invention and are insuffi- cient evidence upon which to base findings and conclusions of lack of patentable invention in the patent in suit (Specification of Errors 1, 2, 3, 5, 6, 7, 8, 9 and 10).....	19
Michelin Patent No. 750,675, Exhibit L, R. 334	20
Athans Patent No. 1,679,017, Exhibit D, R. 292	21
Countryman Patent No. 1,912,475, Exhibit F, R. 305.....	21
Birch Patent No. 210,235, Exhibit K, R. 331.	22
Burns Patent No. 1,181,734, Exhibit H, R. 319; Hinckley Patent No. 135,988, Exhibit J, R. 328; Mapes Patent No. 854,512, Ex- hibit M, R. 339.....	23
Taylor Patent No. 747,270, Exhibit G, R. 315.	23

	Page
Stevens Patent No. 351,474, Exhibit I, R. 324	24
Moore Patent No. 2,184,358, Exhibit N, R. 343	24
Uecker Patent No. 2,203,114, Exhibit E, R. 301	24
Uecker Patent No. 2,043,498, R. 250	25
(C) The application of the leading authorities defining “patentable invention” to the facts of the case at bar	26
(D) The device of the patent in suit is not an “aggrega- tion” as that term is used in patent law.....	41
(E) There is no issue of infringement.....	42
Conclusion	43

Table of Authorities Cited

Cases	Pages
Air Devices, Inc. v. Air Factors, Inc., et al., 210 F. 481 (C.A. 9, 1954).....	26
Bianchi, et al. v. Barili, 168 F. 2d 793 (C.A. 9, 1948)...	27, 34, 40
Brown v. Sharp Mfg. Co. v. Kar Engineering Co. (C.A. 1, 1946), 154 F. 2d 48.....	40
C. & A. Potts & Co. v. Frank F. Creager, et al., 155 U.S. 597, 39 L. Ed. 275.....	30
Cutter Laboratories, Inc. v. Lyophile-Cryochem Corporation, 179 F. 2d 80 (C.A. 9, 1949).....	39
Diamond Rubber Co. v. Consolidated Rubber Tire Company, 220 U.S. 426, 55 L. Ed. 527.....	18
Dick E. Stearns, et al. v. Tinker & Rasor, et al., 220 F. 2d 49.....	37, 38
Faulkner v. Gibbs, 170 F. 2d 34 (C.A. 9, 1948).....	27, 36
Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp., et al., 71 S.Ct. 127, 340 U.S. 147 (1950).....	26
Halliburton Oil Well Cementing Co. v. Walker, et al., 146 F. 2d 817 (C.A. 9, 1944).....	27, 39
Kwikset Locks, Inc. v. Hillgren, 210 F. 2d 483 (C.A. 9, 1954).....	26, 39, 40
Lane-Wells Co. v. M. O. Johnston Oil Field Service Corporation, 181 F. 2d 707 (C.A. 9, 1950).....	41
Oxnard Cannery, Inc., et al. v. Bradley, 194 F. 2d 655 (C.A. 9, 1952)	27
Pacific Contact Laboratories, Inc., et al. v. Solex Laboratories, Inc., 209 F. 2d 529 (C.A. 9, 1953).....	39
Page, et al. v. Myers, 155 F. 2d 57 (C.A. 9, 1946).....	27, 37
Patterson-Ballagh Corp., et al. v. Moss, et al., 201 F. 2d 403 (C.A. 9, 1953).....	27, 33

Payne Furnace & Supply Co. v. Williams-Wallace Co., 117 F. 2d 823 (C.A. 9, 1941).....	40
Pointer v. Six Wheel Corporation, 177 F. 2d 153 (C.A. 9, 1949).....	26, 27, 32
Ralph N. Brodie Co., et al. v. Hydraulic Press Mfg. Co., 151 F. 2d 91 (C.A. 9, 1945).....	27, 39
Refrigeration Engineering, Inc. v. York Corporation, 168 F. 2d 896 (C.A. 9, 1948).....	27, 31
Stuart Oxygen Co., Limited v. Josephian, 162 F. 2d 857 (C.A. 9, 1947).....	27, 35

Statutes

United States Code, Title 28:	
Section 1291	2
Section 1338(a)	2
United States Code, Title 35, Section 103 (January 1, 1953)	30

No. 14,617

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UP-RIGHT, INC., a corporation, and WALLACE
J. S. JOHNSON,

Appellants,

vs.

THE PATENT SCAFFOLDING Co., INC.,
a corporation,

Appellee.

**BRIEF ON BEHALF OF APPELLANTS,
UP-RIGHT, INC. AND WALLACE J. S. JOHNSON.**

STATEMENT OF THE PLEADINGS.

This cause was tried upon issues joined by an Amended Complaint (R. 6), filed by appellants, Up-Right, Inc. and Wallace J. S. Johnson, as the exclusive licensee and owner, respectively, of United States Letters Patent No. 2,618,496 (R. 232), seeking a judgment as against appellee, The Patent Scaffolding Company, Inc., for infringement of said patent, and the Answer to Amended Complaint (R. 9) filed by appellee.

Following the trial¹ and submission of briefs before the United States District Court for the Northern District of

¹The evidence was taken before a jury but at the conclusion of the evidence the parties stipulated (R. 225-227) that the jury be dismissed and the case submitted to the judge for decision.

California, Southern Division, a Memorandum Decision (R. 13) was filed by Judge Goodman, who thereafter entered Findings of Fact and Conclusions of Law (R. 14) and a Judgment (R. 22) adjudging the patent in suit to be invalid and void. The Judgment (R. 22) was filed November 18, 1954 and within 30 days thereafter, to wit, on December 7, 1954, appellants filed a Notice of Appeal (R. 23), together with a Bond for Costs on Appeal (R. 24).

JURISDICTION.

The jurisdiction of the District Court was based upon the patent laws of the United States, namely, Section 1338(a) of Title 28 of the United States Code. The jurisdiction of this Court over this appeal is based upon Section 1291 of Title 28 of the United States Code.

THE PARTIES.

The appellant, Wallace J. S. Johnson, is the inventor named in the patent in suit and is a resident of California; and the appellant, Up-Right, Inc., is a corporation of California, having its place of business at Berkeley, California, and is an exclusive licensee under said patent and manufactures and sells the patented scaffold.

The appellee, the The Patent Scaffolding Company, Inc., is a corporation of New York, having a place of business in the City and County of San Francisco, State of California.

CONCISE ABSTRACT OR STATEMENT OF THE CASE.

The patent in suit, No. 2,618,496 (R. 232), was issued on the invention of appellant Johnson on an application filed September 15, 1947. Just prior to that date, appellant Johnson caused the corporate appellant, Up-Right, Inc., to be formed to manufacture and sell scaffolds embodying the invention² and granted the corporate appellant an exclusive license under the patent.

The scaffolds embodying the invention were immediately commercially successful and created a new conception of scaffolding within that industry. From the inception of the corporate appellant to the time of filing suit, it manufactured and sold approximately 20,000 scaffolds using some 79,500 of the patented legs (R. 101) which were sold throughout the entire United States.

After the commercial acceptance of the appellants' scaffold, and before issuance of the patent in suit, the appellee (long in the general scaffold business) precisely copied the patented structure and embodied it into its scaffold admittedly because the customers demanded it and would not purchase ladder-type scaffolds without it.

Promptly upon issuance of the patent, this action was commenced for patent infringement.

Appellee pleaded the usual defenses of invalidity of the patent and non-infringement. The defense of invalidity was based on the showings of eleven prior patents, none of which discloses a device intended to produce, or capable of producing the results of the patented structure, or sub-

²This was not urged at the trial in that the only evidence was that the accused device was a precise copy of the patented structure.

stantially similar to the patented structure in construction or mode of operation. The District Judge, however, found the various elements of the patented structure separately in these prior patents and held (R. 13-14): “In my opinion, all of the elements aggregated by plaintiffs function as taught in the prior art patents. Plaintiffs did not change nor bring to light anything new in the functioning of these elements. Hence the result is aggregation and not a patentable combination”; and found (R. 16): “The essential elements of the single claim of the patent in suit are disclosed in the patents to: Countryman, 1,912,475; Taylor, 747,270; Burns, 1,181,734; Stevens et al., 351,474; Hinckley, 135,988; Birch, 210,235; Michelin, 750,675; Mapes, 854,512; Moore, 2,184,358; Uecker, 2,203,114; and Athans, 1,679,017. All the said patents had been issued more than one year prior to the filing of the application which resulted in the patent in suit.”

The Court did not state in its Opinion (R. 13) nor is there any finding of fact that any prior art device:

- (a) was substantially the same in construction;
- (b) was substantially the same in mode of operation or function;
- (c) produced substantially the same results by substantially the same mode of operation.

The Trial Court's Opinion and findings are to the effect that if the individual parts of a patented structure can be separately found in prior art structures, no one of which was intended to function, nor capable of functioning like or producing the results of the patented structure, the result is unpatentable aggregation and not patentable invention. Appellants' contention on this appeal is that under the facts of this case the District Judge erred in so concluding.

THE ISSUES.

The single issue upon this appeal is the presence or absence of patentable invention in the patented structure, each individual mechanical part of which is found to be separately old in various prior art devices, *none of which are substantially like the patented structure in construction, function or in results produced*, and which patented structure resulted in an innovation in scaffolding within the scaffold industry.

The question on appeal is: May a patent on a meritorious and successful invention in a scaffold structure, which is new in construction and mode of operation, produces new results, and produced a new scaffold industry, be struck down as a matter of law as “not involving patentable invention” in the face of no other proof than when such new structure is dissected into its individual mechanical parts, each of such parts can be separately found in prior patents on structures substantially dissimilar in construction and function and not intended to, nor capable of obtaining the results of the patented structure?

Stated more broadly, the question on appeal is: Where a new device is created which is a new entity, with a new mode of operation and producing new or substantially improved results, is such a device an unpatentable aggregation and devoid of patentable invention because when dissected into its individual parts such parts are separately found in devices neither intended to nor capable of performing the function of the patented device?

SPECIFICATION OF ERRORS.

1. The District Court erred in finding as a fact (Finding VI) (R. 16) "that the invention claimed in the application for said patent had been described, prior to its filing date of September 15, 1947, in various printed publications, for more than one year prior to the patentee's application for patent." in that such finding of fact is not supported by the evidence.

2. The District Court erred in finding as a fact (Finding VII) (R. 16) that "The essential elements of the single claim of the patent in suit are disclosed in patents to: Countryman, 1,912,475; Taylor, 747,270; Burns, 1,181,734; Stevens et al., 351,474; Hinckley, 135,988; Birch, 210,235; Michelin, 750,675; Mapes, 854,512; Moore, 2,184,358; Uecker, 2,203,114; and Athans, 1,679,017." in that said Finding of Fact is not supported by the evidence.

3. The District Court erred in finding as a fact (Finding VIII) (R. 17): "Calipers embodying adjustments substantially like those in the patent in suit were well known for one year prior to the filing of the application which resulted in the patent in suit, as evidenced by Defendant's Exhibit O and the Stevens Patent No. 351,474." in that such finding is not supported by the evidence.

4. The District Court erred in finding as a fact (Finding IX) (R. 17): "The Patent Office, in issuing the patent in suit, failed to consider the most pertinent art, specifically the patents listed in Finding VII." in that said Finding of Fact is not supported by the evidence.

5. The District Court erred in finding as a fact (Finding X) (R. 17): "All of the elements of the claim in suit as aggregated by plaintiffs function as taught in the prior art

patents.” in that such finding is unsupported by and contrary to the evidence.

6. The District Court erred in finding as a fact (Finding XI) (R. 17): “Plaintiffs did not change, or bring to light, anything new in the functioning of these elements. The result of the claim in suit is aggregation.” in that such finding is unsupported by and contrary to the evidence.

7. The District Court erred in finding as a fact (Finding XIV) (R. 18): “an adjustable supporting leg having telescopic leg members, the inner leg member of which is threaded and the outer leg member carries a releasable split nut engaging with the threads of the inner leg member and a releasable slidable collar holding the parts of the split nut in gripping relation with the threaded inner leg member, was well known as evidenced by Countryman, 1,912,475.”

8. It was error for the District Court to attach any anticipatory significance to the eleven prior patents relied upon to show “lack of invention” where the structures of such prior patents are substantially different than the patented device in construction and function and results produced, and were not intended to nor capable of performing the functions of the patented device.

9. It was error for the District Court to conclude “lack of patentable invention” in the patented structure as a matter of law upon evidence which admittedly failed to show a structure constructed like or capable of performing the functions of the patented device, but merely disclosed that when the patented structure was dissected into its individual mechanical parts, that parts somewhat similar in construction but for different uses and purposes could be separately found in prior art structures of non-analogous nature.

10. It was error for the District Court in view of the state of the prior art as set forth in (9) above to deny patentable invention to the patented structure where the evidence disclosed that such a device not only was immediately and widely successful but established a new conception of scaffolding within the scaffolding industry, and which patented device was paid the tribute of prompt and precise copying by the appellee (one of the oldest and largest in the scaffolding business).

ARGUMENT.

(A) SUMMARY.

This case presents the picture of an outstandingly successful invention which filled a long-standing void in the scaffolding industry, which instead of being recognized as such, is held not to be a patentable invention by the fallacious hindsight reasoning that because its individual mechanical elements are separately old in devices not intended to nor capable of performing its functions or having its mode of operation, the embodiment of such elements into a new structure having a new construction and mode of operation and producing new results is obvious to those skilled in the art and is merely unpatentable aggregation. That the patented structure is new in construction and mode of operation and produces new and improved results is tacitly admitted, because the Trial Judge in his Opinion (R. 13) and in his Findings of Fact (R. 15) completely omitted *any statement or finding to the contrary*. Such omission speaks eloquently that any such statement or finding would be contrary to the evidence.

The long-standing void in the industry filled by the invention and the instantaneous and widespread commercial adoption of the patented structure and its precise copying by the appellee *because customers demanded it* (appellee is one of the oldest and largest in the scaffold art) emphasizes that the invention was unobvious to those expert in the field and must have involved the intangible, ingenious quality above and beyond the skill of the artisans of the industry.

The various elements of the patented claim all contribute to the ability of the structure to perform its new functions, to effect its new and improved results. This spells proper “combination” and not “aggregation” in law. Thus, notwithstanding the Court’s findings to the effect that each individual mechanical element may be specifically found³ in:

(the prior art patents)

Countryman (R. 306) : (an automobile jack)

Taylor (R. 316) : (a carpenter’s wood clamp)

Burns (R. 320) : (a temper screw used in a reciprocating oil-well drilling rig)

Stevens (R. 325) : (a machinist’s calipers or dividers)

Hinckley (R. 329) (a temper screw used in a reciprocating oil-well drilling rig)

Birch (R. 332) : (a gun-wiping ramrod)

³Finding VII (R. 16). The essential elements of the single claim of the patent in suit are disclosed in the patents to: Countryman, 1,912,475; Taylor, 747,270; Burns, 1,181,734; Stevens et al., 351,474; Hinckley, 135,988; Birch, 210,235; Michelin, 750,675; Mapes, 854,512; Moore, 2,184,358; Uecker, 2,203,114; and Athans, 1,679,017. All of the said patents had been issued more than one year prior to the filing of the application which resulted in the patent in suit.

Michelin (R. 335): (a tire valve cap)

Mapes (R. 340): (a temper screw used in a reciprocating oil-well drilling rig)

Moore (R. 344): (a tripod and leg)

Uecker (R. 302): (a scaffold which admitted does not function like or produce results like the patented one)

Athans (R. 293): (a service table)

The prior art patents relied upon by the District Judge to negative invention are not only for the most part of non-analogous character but fail to teach

(a) the construction of the patented device

(b) the functioning of the patented device

(c) a structure intended to or capable of performing the function or obtaining the results of the patented device.

In view of the substantial advance in the scaffolding art effected by the invention and its immediate success, the dissecting of the patented structure and the finding of the parts thereof separately in non-analogous prior devices not intended to and incapable of functioning or obtaining the results of the patented combination is insufficient basis upon which to conclude that the device is an unpatentable aggregation not involving patentable invention under the authorities of this Court of Appeals.

(B) THE FACTS.

(1) **The State of the Portable Scaffold Art at the Time of the Invention.**

The art to which the patent pertains is known generally as portable scaffold, but specifically as the rolling ladder

type of scaffolding best illustrated in Exhibit 14 at R. 274. This exhibit illustrates scaffold in which the precise structure shown in the patent in suit is embodied. Such scaffolds are supported on caster wheels and are made in vertical sections which are detachably superposed to a desired height. The entire scaffold can be rolled along from position to position as desired.

Ladder scaffolds had long been known but it is undisputed that their use was practically limited to interiors of buildings where flat floors were available as a supporting surface due to inherent inability of the scaffold to be adapted to meet the usual conditions of substantially non-level or uneven terrain or the presence of obstacles such as terraces, steps, curbs and the like around the exterior of buildings.

In this state of the art the inventor (appellant) Johnson and another conceived a collapsible scaffold section for such a ladder-type scaffold and obtained a patent therefor (patent at R. 268). He realized, however, that such scaffold would have the same limitations of use as the prior ones unless some means could be provided to make it practical for exterior work and eliminate the inherent shortcomings of prior scaffolds (R. 35-38). He recognized that the problem requiring solution was to construct such scaffold so it would have the following requisites (taken from Mr. Johnson's testimony R. 37 and 38):

“Mr. Mellin. Q. Mr. Johnson, what requisites were required for adjustability of the scaffold of the type you designed?

(a) For a portable scaffold there were a number of what I thought to be severe requirements. For one

thing, the scaffold leg or adjustable mechanism of whatever kind it was, had to be so fixed within the structure or the tubular outer leg of the scaffold that it would sustain sidewise loads as well as vertical loads, because in a portable scaffold which rolls by itself from position to position it normally is not fastened to a building or other structure which will take side loads, and therefore the scaffold had to—the leg had to be strong adjusted in any position so that sidewise it wouldn't buckle. That would be one very important characteristic of it.

(b) Another would be that the scaffold would have to take a vertical load in any position of the adjustment, because the entire weight of people or material on the scaffold would rest directly on the legs of the scaffold, and it being unattached to anything else, it would have to absorb all that load by itself.

(c) Another characteristic of the leg would have to be that it was firmly and positively locked within the structure of the scaffold, because you see moving it along from position to position implies rolling it over curbs or other holes in the ground or floor, and the leg couldn't by any means fall out, either by the fact that it wasn't frictionally tight in there or it was just loose in there; it had to be positively locked in there so when it was rolled over a hollow point in the floor or ground it wouldn't fall out.

(d) Another requirement was that it had to be able to be adjusted for a coarse or a large adjustment quickly and easily, because the inherent nature of the concept of the scaffold was that it had to be easily moved from position to position and each position had a different conformation of the ground or terrain, so that instead of something that had to be laboriously screwed or

otherwise adjusted up and down it had to have a rapid adjustment quick and easy over a considerable distance.

(e) I should say another characteristic that it requires for a portable concept of scaffold is that it have a fine adjustment so that after you made the coarse adjustment and you are up on top of a structure which is depending entirely upon itself for its stability and a fine adjustment had to be made so that it can have no wobble in the structure — if it were stationary or static form of scaffolding fastened to a wall, it wouldn't be so important then to have a fine adjustment so that it would be stable when it was adjusted."

Mr. Johnson, realizing that unless he could solve the problem his scaffold was of little commercial value, made a thorough search of the available art and could not find any mechanism answering the problem (R. 36, 38, 39). The invention of the scaffold section (not the invention in suit), was in 1945 yet it wasn't until after Mr. Johnson had solved the problem by the invention of the patent in suit that the appellant corporation was formed and scaffolds were commercially produced.

The embodiment of the patented structure in the scaffold gave the latter the necessary requisites to fill the need which existed and exterior portable rolling ladder-type scaffolding was born and became a valuable and substantial addition to the scaffold industry.

Mr. Johnson, commencing at R. 40, describes the patented structure and the manner in which it accomplishes its new functions and results. This also can be had from the patent (R. 232) or the exemplar of the device itself (Exhibit No. 7). It may be helpful to briefly discuss it here.

To form the patented structure⁴ a tubular supporting leg (1) is provided which is slit vertically from its lower end to form depending resilient fingers which are outwardly radially biased (2). A threaded relatively long inner leg (3) is telescoped into the outer tubular leg which has an unthreaded upper bearing portion (4) snugly sliding within the tubular leg. This upper bearing portion is much shorter than the threaded portion. The structure includes a segmental internally threaded nut (5), one part of which is welded to the interior of each resilient finger at its lowermost end. This segmental nut is normally held expanded out of engagement with the threaded inner leg by the biased resilient fingers, but when the nut is contracted by a sliding collar (6) on the outer leg, it is held in threaded engagement with the inner leg.

⁴To compare the structure with the patented claim element by element, we here point out how the elements of the patented structure appear in the claim:

(1) A scaffold supporting leg comprising a vertical tubular outer supporting leg member

(2) terminating at its lower end in a plurality of downwardly extending outwardly radially biased resilient fingers integral therewith,

(3) an inner member telescopically received within the outer member.

(4) said inner member having an upper cylindrical bearing portion engaging a complementary portion of said outer supporting leg member and having an externally threaded lower portion,

(5) a segmental internally threaded nut fixedly secured to said fingers for threaded engagement with the threaded portion of the inner member when the fingers are forced inwardly,

(6) a collar on the outer member movable relative to the nut to force the fingers inwardly to place the nut in threaded engagement with the threads of the inner member and to retain such engagement until the collar is moved relative to the nut to permit the fingers to move radially outwardly, the length of the threaded portion on the inner member being substantially greater than the length of the threaded portion of the nut.

In such condition the leg structure supports the complete vertical load on the threaded connection (requirement (a) above). It supports the side load or thrust by the threaded gripping of the inner leg by the nut and the engagement of the unthreaded bearing portion with the interior of the outer leg at a point spaced along the leg from the nut (requirements (a) and (b) above). These two points of gripping cooperate to resist side thrust and prevent wobble. Also, the unthreaded bearing portion cooperates with the fingers and nut segments in preventing the leg from being screwed out of the outer leg and toppling the scaffold, and also prevents the leg from falling out of the outer leg when rolled over a hole or deep depression and collapsing the scaffold (fulfilling requirement (c) above.)

By releasing the resilient fingers to expand the nut outwardly by sliding the collar out of engagement with the fingers, the inner ground-engaging leg can immediately be lowered its full length or be telescoped its full length upwardly into the outer tubular length, enabling an instantaneous coarse adjustment (in practice this is approximately three feet) (fulfilling requirement (d) above).

By turning the leg manually, the threaded engagement between the segmental nut and the threaded inner leg enables a fine or micrometer adjustment of the leg height to make certain all four scaffold legs properly engage the ground support to prevent wobbling such as a table does when one leg doesn't quite bear on the floor. In a tall scaffold this is of great importance (fulfilling requirement (e) above).

In use, the scaffold is erected at the exterior of the building to the proper height. Being but six feet long, it must

be frequently shifted when cleaning, painting or repairing a building, and the time required to shift the scaffold to its new position and set it for use is of high practical importance. When shifted, the patented scaffold can be immediately adapted to the terrain (no matter how rough or uneven) by releasing the inner legs one by one to engage the terrain and then reclamp the outer leg to the inner leg by contracting the spring fingers and nut by means of the sleeve support. Thus, if curbs, steps, or depressions of substantial height or depth are met, a minimum of time is expended to adjust the legs differently to the substantially different levels. Also, on steep grades this advantage is important. Once the coarse adjustment is made, a fine adjustment (a turn or two) is made to exactly plumb the scaffold to make it stable and safe, and the scaffold is ready for use.

It is important to point out (as above described) that the cooperation of the upper bearing portion of the inner leg and the nut (a) prevents wobbling of the scaffold; (b) keeps the inner leg from dropping out of the outer leg when and if it passes over a hole or depression when the scaffold is moved from position to position; and (c) keeps the inner leg from being unscrewed out of the outer leg when finely adjusting to plumb the scaffold.

The reasons that prior rolling scaffolds⁵ were unsuited for and unused in exterior work were (a) where substantially different elevations were met, the legs each had to be slowly and laboriously adjusted vertically by turning a nut on the threaded inner leg to raise or lower it a small fraction of an inch per revolution. This slow process required

⁵The patent to Uecker (R. 302) is an accurate exemplar of the prior art structures. An exact physical exemplar (one leg only) is in evidence as Plaintiffs' Exhibit 12.

so much time as to make the scaffold unfeasible for exterior work; (b) in addition, as will be seen from Fig. 2 of the Uecker patent (R. 302), if it were fitted with a caster and the scaffold rolled to align one leg with a hole or deep depression, the inner leg 14, its nut 20-27, and the upper slide 15 would drop out of the scaffold leg. This is clearly apparent from an examination of the physical prior leg (Exhibit 12).

Clearly, from the evidence as outlined above, the patented structure has new functions, produces new results, and supplied an unfilled need in the scaffold art by providing a stable, efficient and usable rolling ladder-type scaffold for exterior work.

(2) The Appellee's Tribute to the Invention.

Appellee (defendant), for more than 10 years (R. 178) prior to the time appellants' patented scaffold was produced and widely successful in the industry, was manufacturing and selling the old type of scaffold above discussed with legs as exemplified in Exhibit 12 and Uecker patent (Exhibit E, R. 302). Immediately the patented structure was introduced and demanded by the trade, appellee precisely copied the patented structure. That the copying was precise, even as to details of dimensions and threads, is shown by the testimony of Mr. Johnson at R. 59. The appellee's reason for so copying the patented structure was that customers demanded it (appellee so admitted R. 182-183).

It seems convincing evidence that the invention was not obvious to those skilled in the art, when it is considered that it was certainly not obvious to appellee during the ten years it made the old type incapable of the functions of the patented type. As one Court aptly put it (*Diamond Rubber Co.*

v. Consolidated Rubber Tire Company, 220 U.S. 426, 55 L. Ed. 527) :

“We see the strength of the concession to its (the patent’s) advance beyond the prior art and its novelty and utility by the rubber company’s imitation of it.”

* * * * *

“It gives the tribute of its praise to the prior art; it gives the Grant tire the tribute of its imitation.”

(3) The Immediate and Widespread Success of the Invention.

Appellants’ patent in providing the first successful solution to the problem of rolling ladder-type scaffold for exterior use was an innovation and added a new concept of scaffold to the industry. This is made amply apparent by its immediate and widespread acceptance (as well as adoption by appellee who was long in the field).

This novel concept was quickly adopted as is witnessed by the fact that a new company (appellant) was formed in 1948, between which time and the commencing of this suit in 1952 had made and sold some 20,000 base scaffolding units embodying over 79,000 of the patented structures. This quick adoption of the novel concept by industry as a standard certainly belies a hindsight finding that it was “obvious”.

While the success of the invention cannot be substituted for invention, it is a factor which has weight in considering the presence or absence of patentable invention, as this Court has many times stated. (See *Pointer v. Six Wheel Corporation* (C.A.9), 117 F. 2d 153.)

(4) The Prior Art Patents Relied Upon Are in Fact Insufficient to Negative Invention and Are Insufficient Evidence Upon Which to Base Findings and Conclusions of Lack of Patentable Invention in the Patent in Suit (Specification of Errors 1, 2, 3, 5, 6, 7, 8, 9 and 10).

Before individually discussing the prior art patents relied upon to negative invention in the patent in suit, we emphasize that the District Court *did not state in its Memorandum Opinion R. 13 or make any finding of fact* that any prior art device was substantially the same as the patented device in

- (1) construction
- (2) function or mode of operation
- (3) producing substantially the same results.

The District Court merely found that the various elements were separately old in various prior structures (for the most part non-analogous structures). Findings that the invention lacked a new construction, new functions and mode of operation and failed to produce new or expected results were not made and could not possibly be supported by the evidence.

Appellee's own expert, Mr. White (a practicing patent lawyer), who had no practical experience in the scaffolding art except what he gained in preparing to testify, admittedly could not stretch the prior patents sufficiently to effectively meet the invention involved.

On cross-examination Mr. White was asked (R. 170-171):

“Q. By the way, Mr. White, of all of these patents that you have brought before us and explained to the jury, which one in particular do you think is most like the device of the patent in suit in construction and in mode of operation?”

A. So far as structure is concerned, the Michelin patent shows all the elements of the clutch mechanism; and so far as operation as a leg is concerned on the general aspects, as I stated before, the Athans patent shows the general adjustment with a different clutch mechanism. Countryman on the jack shows every element of the combination.”

Inasmuch as appellee’s own “expert” considered those three patents to be the closest to the invention, we will discuss them first.

Michelin Patent No. 750,675, Exhibit L, R. 334.

This patent shows a split nut for firmly holding an automotive tire stem firmly in place relative to the auto wheel. It enables quick positioning of the nut over the traditionally long tire stem against the rim and then tightening the nut to make a firm clamp.

Appellee’s Mr. White admitted (R. 159) that no suggestion of a scaffold supporting leg was found in that patent or that the tire stem could act as a supporting leg. Further, he admitted that there was no suggestion in this patent of the features of the patented device which prevented wobbling, unthreading or accidental removal of the inner leg of a scaffold from the outer (R. 159). In fact, he went so far as to admit that the only pertinency of this patent was that it merely disclosed an application of the old split nut (R. 171).

This non-analogous patent disclosure does not show the patented structure nor any of its functions or results, nor the functioning of any of its elements, and is insufficient evidence upon which to base the contested findings.⁶

⁶Findings VI and VII (Specification of Errors Nos. 1 and 2).

Athans Patent No. 1,679,017, Exhibit D, R. 292.

This is a table leg and appellee's expert, Mr. White, freely admitted (a) that the Athans device has no mechanical connection between the parts of the leg (R. 166); (b) that Athans has no threaded or similar adjustment between the leg parts (R. 166); (c) that it does not have the functions of the patented device (R. 166); and (d) that the Athans device was unfitted for a scaffold leg and he would not so use it (R. 166).

In view of appellee's own appraisal of this patent, it falls miserably short of anticipating the patented invention. It not only does not bear any similarity in construction to the patented device but has none of its functions (except it telescopes) or produces none of its results. Except that the lower end of the outer member is slit so it may be contracted, the Athans device has no "element" structurally or functionally like any element in the patented structure. Yet this is by its own appraisal appellee's best evidence upon which to base a finding of lack of novelty in the construction of the patent in suit. This patent is obviously insufficient evidence to support the findings of fact contested.⁷

Countryman Patent No. 1,912,475, Exhibit F, R. 305.

This device is an automobile or like jack. It has a work-engaging top member 26 (referring to the drawings R. 306) fixed on a tube 25 which telescopes over the screw jack member 1. Diametrically opposite pawls 28 (referring to Fig. 6) are pivoted to the lower end of the tube to engage

⁷Specification of Errors Nos. 1 and 2—relating to Findings of Fact Nos. VI and VII.

the threads of the member 1 and lock the tube to the screw. A ring 31 is provided to hold the locking pawls engaged with the screw.

This device neither shows the construction nor the functions of the patented device. For example, appellee's expert, Mr. White, admitted that Countryman required gears operating a separate captive nut to effect a fine adjustment (R. 167). He also admitted that the threaded member could be threaded out of the pivotal parts of the latch mechanism (R. 168) and further that the device is free to wobble in use (R. 168). Mr. White freely admitted (R. 167) that the Countryman device does not have the same mode of operation or produce the same results as the patented device. With these admissions, it cannot be said that Countryman is evidence of lack of novelty in the patented entity or the essential elements thereof as found in the contested findings.⁸

This patent falls far short of being sufficient to justify Findings VII and XIV.

Birch Patent No. 210,235, Exhibit K, R. 331.

This patent shows a quick detachable connection for a gun wiper. Appellee's witness, Mr. White, admitted it had no ability for adjustment and was offered merely to show another application of a split nut (R. 172). This patent consequently is not only of no aid to appellee in showing lack of invention in the patent in suit, but does not as found⁹ contain any of the elements of the patented claim with their function as found as a fact.⁹

⁸Contested—Specification of Errors Nos. 1, 2 and 7.

⁹Contested Finding VII—Specification of Errors No. 2.

Burns Patent No. 1,181,734, Exhibit H, R. 319;
Hinckley Patent No. 135,988, Exhibit J, R. 328;
Mapes Patent No. 854,512, Exhibit M, R. 339.

These patents all show different conceptions of temper screws used in drilling wells. These devices have nothing in common in function or result with the patented structure. They all employ a split nut travelling back and forth on a threaded rod. None of them shows (a) the telescopic feature of the patented device and (b) the forming of a scaffold leg with spring fingers and the integral nut parts thereon which cooperate with a caster leg to enable rapid and fine adjustment, prevent accidental displacement or wobble between the leg parts. In fact, no suggestion of the patented construction, mode of operation, or results is found in these patents. Yet these patents were included as containing essential elements of the patented structure in contested Finding VII.^{9a}

Taylor Patent No. 747,270, Exhibit G, R. 315.

This patent discloses a carpenter's wood clamp. Appellee's witness, Mr. White, admitted it merely discloses another application of a split nut on a threaded bolt (R. 168) in which the nut parts are urged outward by leaf springs and urged inward by a collar. Appellee made no contention, other than above stated, that this patent disclosed a device having the mode of operation or produced the results of the patented device at bar.

Despite this, the contested finding¹⁰ is to the effect that essential elements of the patented device with their function are present in this prior device.

^{9a}Contested Finding VII—Specification of Errors No. 2.

¹⁰Finding VII—Specification of Errors No. 2.

Stevens Patent No. 351,474, Exhibit I, R. 324.

The Stevens patent discloses an adjustable nut for a pair of machinist's calipers or dividers (R. 140). Mr. White admitted that the Stevens patent merely shows another application and use of a split nut (R. 170). Except that it employs a split nut in another capacity, this prior patent bears no relationship to the patented structure.¹¹

Moore Patent No. 2,184,358, Exhibit N, R. 343.

The only thing that this patent (on a tripod leg) has in common with the patented device is that the upper end of the inner member in each is unthreaded. No other similarity other than broadly speaking each includes telescopic members. The above is based on appellee's Mr. White's testimony at R. 175-176.

This device does not disclose the cooperating essential elements of the patented device or their function as found in the contested findings.¹²

Uecker Patent No. 2,203,114, Exhibit E, R. 301.

This patent represents the prior device which appellee abandoned in favor of the patented device. Appellee's expert, Mr. White, in substance admitted that the Uecker device does not have the mode of operation of the patented device (R. 166) and it does not have the ability to be rapidly adjusted (R. 166). In fact, the Uecker device was the appel-

¹¹Despite this the finding contested (Finding VIII—Specification of Errors No. 3) states:

“Calipers embodying adjustments substantially like those in the patent in suit were well known for one year prior to the filing of the application which resulted in the patent in suit, as evidenced by Defendant's Exhibit O and the Stevens Patent No. 351,474.”

¹²Finding VII—Specification of Errors No. 2.

lee's prior commercial device, Exhibit 12, which according to the evidence was a failure and was replaced by the patented device.

Admittedly not having the mode of operation of the patented device nor capable of producing its results, the Uecker patent fails to indicate lack of invention in the device at bar or include its essential elements as found.¹³

Uecker Patent No. 2,043,498, R. 250.

This patent merely shows a scaffold leg having the caster leg threaded into it. This device has none of the functions of the patented device except it can be adjusted vertically in minute steps. This is the device of the character formerly used by appellee and abandoned in favor of the patented device. Not being capable of the functions of the patented device nor able to produce the results of the patented device, this prior art disclosure is of no importance in showing lack of invention in the patented device.

Just how the Trial Judge arrived at the conclusion that the various pieces found separately in eleven prior patents (none having the functions served by them in the patented structure and embodied in devices not intended to nor capable of functioning like or obtaining the results of the patented structure), could be obviously assembled to form the patented structure with its functions was not explained by the Court in its Opinion or in its findings. We urge that the Trial Court fell into the error of believing that if the physical counterparts of the various pieces are found in different prior structures (without regard to their function), that

¹³Finding VII—Specification of Errors No. 2.

combining such old parts into a new entity having new functions and results was "unpatentable aggregation."

This is not the rule followed by this Court¹⁴ which is well stated in *Pointer v. Six Wheel Corporation*, 177 F. 2d 153 (C.A.9, 1949). The Court, in finding invention and sustaining the patent, stated as follows:

"* * * invention cannot be defeated merely by showing that, in one form or another, each element was known or used before. *Hailes v. Van Wormer*, 1875, 20 Wall., 353, 22 L. Ed. 241, *Bassick Mfg. Co. v. R. M. Hollingshead Co.*, 1936, 298 U.S. 415, 425, 56 S. Ct. 787, 80 L. Ed. 1251; *Kings County Raisin & Fruit Co. v. U. S. Consolidated Seeded Raisin Co.*, 9 Cir., 1910, 182 F. 59; *Stebler v. Riverside Heights Orange Growers Ass'n*, 9 Cir., 205 F. 735; *Skinner Bros. Belting Co. v. Oil Well Improvements Co.*, 10 Cir., 1931, 54 F. 2d 896, 898; *Haliburton Oil Well Cementing Co. v. Walker*, 9 Cir., 1944, 146 F. 2d 817, 819."

(C) THE APPLICATION OF THE LEADING AUTHORITIES DEFINING "PATENTABLE INVENTION" TO THE FACTS OF THE CASE AT BAR.

From the foregoing discussion of the facts and the prior art, the patent in suit meets the test of invention set out in the A. & P. case¹⁵ and the recent cases¹⁶ in this Court.

¹⁴Additional authorities of this Court on the point are discussed later in this brief.

¹⁵*Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp., et al.*, 71 S.Ct. 127, 340 U.S. 147 (1950).

¹⁶*Kwikset Locks, Inc. v. Hillgren*, 210 F. 2d 483 (C.A. 9, 1954);

Air Devices, Inc. v. Air Factors, Inc., et al., 210 F. 481 (C.A. 9, 1954);

The appellee did not contend but tacitly agreed that no prior art structure has been found having the construction and functions of the patented device or producing its results. The Trial Court also so agreed as follows (R. 214):

“Mr. Mellin. That is right, Your Honor. Where in the prior art does the concept of the finding that in a scaffold leg you could make the bottom part of the leg in a fashion that has been done, adding and making use of that function for a quick and a small adjustment at the same time preventing swaying and preventing accidental tipping over? Where is it in the prior art? It isn't there.

The Court. I agree with you it isn't there. The mere fact that something has considerable value and is utilitarian, it is useful and so forth, it is created, doesn't necessarily make it patentable.”

Thus, the fact that the device is a new entity having new functions, producing new results and resulting in a new conception of scaffolding being added to that industry, coupled

Patterson-Ballagh Corp., et al. v. Moss, et al., 201 F. 2d 403 (C.A. 9, 1953);

Pointer v. Six Wheel Corporation, 177 F. 2d 153 (C.A. 9, 1949);

Oxnard Cannery, Inc., et al. v. Bradley, 194 F. 2d 655 (C.A. 9, 1952);

Refrigeration Engineering, Inc. v. York Corporation, 168 F. 2d 896 (C.A. 9, 1948);

Faulkner v. Gibbs, 170 F. 2d 34 (C.A. 9, 1948);

Bianchi, et al. v. Barili, 168 F. 2d 793 (C.A. 9, 1948);

Page, et al. v. Myers, 155 F. 2d 57 (C.A. 9, 1946);

Ralph N. Brodie Co., et al. v. Hydraulic Press Mfg. Co., 151 F. 2d 91 (C.A. 9, 1945);

Halliburton Oil Well Cementing Co. v. Walker, et al., 146 F. 2d 817 (C.A. 9, 1944);

Stuart Oxygen Co., Limited v. Josephian, 162 F. 2d 857 (C.A. 9, 1947);

Dick E. Stearns, et al. v. Tinker & Rasor, et al., 220 F. 2d 49.

with the fact that it met with immediate and widespread success of the invention and was *promptly copied by appellee*, definitely shows that the patented structure meets the test of patentable invention laid down by our Supreme Court and this Court.

In the patented device the conjunction or concert of known elements has contributed something; the whole has exceeded the sum of its parts. This is the test of invention set out by Mr. Justice Jackson in the A. & P. case as follows:

“* * * The conjunction or concert of known elements must contribute something; only when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable * * *.”

The different mode of operation of the patented device springs from the conjunction or concert of the different functions performed by the known elements and resulted in the industry adopting the invention.

In addition, the elements of the patented device when considered individually, have been shown to perform different or additional functions in the new combination than the functions they performed in their old surroundings. This is another test stated by Justice Jackson in the A. & P. case:

“* * * A patent for a combination which only unites old elements with no change in their respective functions, such as presented here, obviously withdraws what already is known into the field of its monopoly * * *.”

This difference in function of the components of the patented device appears from a brief comparison of the undisputed character of the prior art.

While the Athans (R. 293), Moore, (R. 344), Uecker (R. 302) patents show telescopic legs (Athans for a table; Moore for a tripod; Uecker for a scaffold), none of these patents had the weight-sustaining, non-wobbling, instantly adjustable over a wide range and finely adjustable features of the patented device. This was, as above pointed out, admitted by appellee. Indeed, those prior devices were not intended to nor capable of the functions of the patented device and the results it produced.

The Michelin (R. 355) (a tire stem nut or cap), the Countryman (R. 306) (an automobile jack), Taylor (R. 316) (a carpenter's wood clamp), Stevens (R. 325) (a machinists' calipers), Mapes (R. 340), Hinkley (R. 329), Burns (R. 320) (all temper screws for oil-well drilling rigs), Birch (R. 332) (a gun ramrod) patents, merely show various forms of a split nut in different assemblages for other purposes and uses and not for functioning as weight-sustaining, vertically stable, instantaneously adjustable over a wide range and finely adjustable leg for a rolling scaffold. Undisputedly, such prior devices were not intended to nor are they capable of the patented use.

It seems convincingly clear that the patented device, when considered in the light of these uncontroverted facts, operates in a manner theretofore unknown in scaffolding due to the conjunction or concert of action of known elements so that the whole has exceeded the sum of its parts, thus fully meeting the test of invention of the A. & P. case.

The A. & P. case has had much discussion by the courts, we think principally due to the minority opinion. This minority opinion was based primarily upon the thought that the grocery store rack was a gadget of the same ilk as

a rubber eraser on a pencil, a clay door knob instead of a metal door knob, a paper collar instead of a cloth collar, and the like. This kind of reasoning is inapplicable to the patented invention which obviously is not a gadget.

The test of invention of the A. & P. case, when carefully considered, boils down to another frequently applied test of invention; that is, obviousness. In other words, of a combination of old elements, due to the concert of action of those elements, contributes a result which exceeds the sum of its parts, then the invention can well be said to be an unobvious one. This is the test adopted by Congress in the new PATENT STATUTE effective January 1st, 1953, Section 103, Title 35, U.S.C. that a patent may not be obtained —

“* * * if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole *would have been obvious, at the time the invention was made, to a person having ordinary skill in the art to which said subject matter pertains.*” (Emphasis added.)

It is significant that this language is just a different way of stating the test of the A. & P. case and, further, is a re-statement of the test of invention set out in the landmark decision of the Supreme Court in *C. & A. Potts & Co. v. Frank F. Creager, et al.*, 155 U.S. 597; 39 L. Ed. 275. In that decision, the Court admonished against the very pitfall into which the Trial Court fell, warning the inexperienced person against the application of hindsight to determine what was obvious to an industry instead of viewing the activities of the industry and those skilled in the industry to see what was obvious. In this case it was stated:

“* * * The apparent simplicity of a new device often leads an inexperienced person to think that it would

have occurred to anyone familiar with the subject; but the decisive answer is that with dozens and perhaps hundreds of others laboring in the same field, it had never occurred to anyone before. The practiced eye of an ordinary mechanic may be safely trusted to see what ought to be apparent to everyone.”

Under the facts of the case at bar, this Court has uniformly sustained patents. Among the cases so holding are the following:

Refrigeration Engineering, Inc. v. York Corporation,
168 F. 2d 896 (C.A.9, 1948).

“*Defendant concedes that all elements of the claimed invention were old and well known to the refrigeration art prior to such invention. Its position is that McAdam’s arrangement and assembly of these old elements has created a new combination which unites these old elements in such manner as to provide or create a new entity divorced from any one element; that in the ‘composite’, or union of all its elements, the effect produced by their joint action is a new, final and combined result in the art of refrigeration never produced before; and that this combination introduced a new function in an old art by producing a new, useful and final effect, result and method which performs an old function in the art of refrigeration in a new and more advantageous way.*

“An expert witness for defendant testified that: ‘*In this combination you have a new entity*¹⁵ which brings out a different result and a combined result of all of those elements to produce the final result which makes the thing successful.’ And again, ‘Each of the elements is old but in being brought into this particular com-

¹⁵Court’s emphasis.

ination it has provided a new entity which is divorced from any one element and is the composite of all of those elements* which produced a new result which has never been produced before.' ”

The present device fully meets the “new entity” rule of the above case and is patentable.

Pointer v. Six Wheel Corporation, 177 F. 2d 153 (C.A. 9, 1949).

The issue in this case was the question of invention. The device involved was a tandem axle arrangement for automotive trucks. The new idea involved was to insert a universal joint (old element in the the automotive art) between the rocker arm (old element in the art) and the added axle (old element in the art) of the tandem axle assembly (old assembly in the art).

The Court, in stating the invention, stated as follows:

“He solved the problem by interposing a universal joint between the rocker arm and the added axle of the tandem axle assembly. The second axle has freedom of movement. It may assume an irregular position or angle to the driven axle. The universal joints prevent the strain on the added axle.

“In brief, when the vehicle passes over a rough road, the movements of the wheels conform to the contour of the road, the wheels moving towards one another or away from one another. At the same time, as the wheels always revolve in the direction of the travel, they track.”

We emphasize here that *there was no new element per se involved in this combination*, but merely old elements assembled to meet the tandem axle problem.

The Court, in finding invention and sustaining the patent, stated as follows:

“* * * invention cannot be defeated merely by showing that, in one form or another, each element was known or used before. *Hailes v. Van Wormer*, 1875, 20 Wall., 353, 22 L. Ed. 241, *Bassick Mfg. Co. v. R. M. Hollingshead Co.*, 1936, 298 U.S. 415, 425, 56 S. Ct. 787, 80 L. Ed. 1251; *Kings County Raisin & Fruit Co. v. U. S. Consolidated Seeded Raisin Co.*, 9 Cir., 1910, 182 F. 59; *Stebler v. Riverside Heights Orange Growers Ass’n*, 9 Cir., 205 F. 735; *Skinner Bros. Belting Co. v. Oil Well Improvements Co.*, 10 Cir., 1931, 54 F. 2d 896, 898; *Haliburton Oil Well Cementing Co. v. Walker*, 9 Cir., 1944, 146 F. 2d 817, 819.

“The question is: *Did anyone before think of combining them in this manner in order to achieve the particular unitary result, — a new function? If not, there is invention.*¹⁸ *Keystone Mfg. Co. v. Adams*, 1894, 151 U.S. 193, 14 S. Ct. 295, 38 L. Ed. 103; *Faries Mfg. Co. v. George W. Brown & Co.*, 7 Cir., 1902, 121 F. 547; *Lincoln Engineering Co. of Illinois v. Stewart-Warner Corp.*, 1938, 303 U.S. 545, 549, 58 S. Ct. 662, 82 L. Ed. 1008; *Lincoln Stores v. Nashua Mfg. Co.*, 1 Circ., 1947, 157 F. 2d 154, 162.

“At times, the result is accomplished by means which seem simple afterwards. * * *”

Patterson-Ballagh Corp., et al. v. Moss, et al., F. 2d 403 (C.A. 9, 1953).

The invention involved was a rotating spool designed to alleviate lateral whip of the drilling line between the crown block and the cylinder drum.

¹⁸All emphasis ours unless otherwise noted.

It appears from the decision that the main change over the prior art was in hanging the spooler from an eye at the top of the spooler rather than from the middle of the spooler. See the following from that opinion:

“If hanging a spooler from an eye at the top was obvious to one skilled in the art, including a practical man of the oil fields, we do not understand why appellants manufactured their spoolers with an eye in the middle from July 1936 to July 1937. There are other unanswered questions. If appellants finally changed the eye on their spoolers from the middle to the top in July 1937 in response to suggestions received from men working in the oil fields, as they allege, why were these men not brought forward to testify? If these suggestions were received in 1936 and 1937, why were they not incorporated in a patent application for a spooler filed by appellants in December 1936, and the Reed patent application filed in May 1937?”

In finding invention, the Court stated as follows:

“It is quite apparent that simplicity alone will not preclude invention. Hindsight tends to color the seeming obviousness of that which in fact is true contribution to prior art. ‘Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skilful attention.’ *Diamond Rubber Co. v. Consolidated Rubber Tire Co.*, 1911, 220 U.S. 428, 435, 31 S. Ct. 444, 447, 55 L. Ed. 527.”

Bianchi, et al v. Barili, 168 F. 2d 793 (C.A. 9, 1948).

The patent was held to disclose invention in a ravioli machine which, like the invention at bar, used old mechani-

cal principles but had new functions and produced new results. The Court stated as follows:

“Barili’s patent discloses a ‘combination’ device. For example, molds were known to the prior art (Evans); so were rollers between which alimentary paste was to be pressed (Holmes, Evans, and Tommasini); so were cutters or ‘teeth’ (Evans, Oleri and Tommasini); and so were hoppers containing stuffing (Holmes and Tommasini). Barili’s contribution to the art was to combine these and other elements in such a form as to turn out ravioli in a different manner and with greater rapidity.

“Such advance involves more than mere technical skill of which, in the language of the books, any one learned in the art might be capable. Barili’s contribution amounts to actual invention: not invention, perhaps, of the highest order, but an invention that is patentable.

“For one thing, Barili’s machine is superior in two respects over the devices invented by Holmes and Tommasini, his closest rivals. Unlike Holmes, Barili provides wide flanges or margins for his ravioli, so that they may be tightly sealed and thus prevent the stuffing from leaking. Unlike Tommasini, Barili offers an invention capable of turning out not one but twelve ravioli with every synchronous rotation of the two form and cutting rollers.”

Stuart Oxygen Co., Limited v. Josephian, 162 F. 2d 857 (C.A. 9, 1947).

The invention here was manifolding a group of steel gas bottles (tanks) together on a flat plate having a disk on its underside to enable rolling of the tanks (barrellike) when tilted.

The Court stated the invention as follows :

“* * * They cast about for some way to deliver a number of tanks manifolded together so that less handling would be required. But to fasten many tanks together made the unit so heavy that it could not be conveniently handled — particularly so, since, in many instances, the valve fittings had to connect exactly with the consumer’s pipe lines. Moreover, other considerations made it imperative that the multiple unit, when constructed, could be handled manually by a single man.

“Appellee then invented and patented a device whereby a number of tanks were mounted upon a plate (see the illustration) manifolded together so that the gas from all the tanks could be drawn from a single connection, and the entire unit so balanced upon what appellee calls a ‘track’ that it could be handled manually by a single workman. * * *”

* * * * *

“As we construe appellee’s patent, his invention is a device to enable one man to handle manually, by rolling along on the ‘track’, a large number of cylindrical tanks of great weight, with comparative safety from overturning. * * *”

The invention above merely used very simple mechanical elements, but it produced very practical results.

Faulkner v. Gibbs, 170 F. 2d 34 (C.A. 9, 1948).

This patent covered a pin-ball game. The Court, in holding the patent valid, said :

“Appellee’s device is concededly a combination of old elements but he claims that it is a new and novel entity producing a new result never produced before. He sought the relief usually demanded in infringement cases.”

* * * * *

“In essence appellee’s patented game device is an assembly or combination comprising a plurality of electrically interconnected game units each of which units has the general outward appearance of the well known pin-ball machine. Each unit is operated by a separate player who competes with players operating the other units in the multiple assembly. See *Gibbs v. T.Z.R. Amusement Corporation*, reported in D.C., 14 F. Supp. 957, a case involving the Gibbs patent. (All of the claims of the patent are there set forth and in the interest of brevity they are not repeated here.)”

When dissected, each element used in the game was old but the new entity created was an invention. The latter is true in the case at bar.

Page, et al. v. Myers, 155 F. 2d 57 (C.A. 9, 1946).

The question here was whether or not a reassembly of old parts accomplishing a new purpose involved invention. The Court held it did and the patent was valid. The Court stated as follows:

“The pivotally mounted bunks were known prior to the Myers patent, the use of rub plates at some distance from the center pin was old, and the use of forked or straddle mountings on other dual axle vehicles was old in the art.

“The only question here is whether the combination constituted patentable novelty.”

As to the matter of invention, the Court stated as follows:

“In the Webster Loom Case, the *Loom Co. v. Higgins*, 105 U.S. 580, 26 L. Ed. 1177, the Supreme Court declared a patent for an improved loom for weaving pile fabrics valid, setting forth the test for distinguishing patentable combination and mere aggregation. The

Webster loom was old, every part was known to the loom manufacturer and the weaver. The court applied the test that if the new combination of old elements produced a new and beneficial result never attained before, it was evidence of invention. The Webster loom produced 50 yards where the former looms had produced 40 yards, and the court said the combination by which this was effected, even if those elements were separately known before, was invention sufficient to form the basis of a patent.

“In *Wire Tie Machine Co. v. Pacific Box Corporation*, 9 Cir., 102 F. 2d 543, 552, this court upheld a patent for a fully automatic wire binding machine that tied a flat knot, applying the test of the Webster Loom case. Also see *Levin v. Coe*, 76 U.S. App. D.C. 347, 132 F. 2d 589.”

Here is another example where the elements, when dissected, were each separately old, but modification of them and a new combination of them was patentable. Using the same test, the patent in suit is certainly valid.

In its latest decision on the point (*Dick E. Stearns, et al. v. Tinker & Rasor, et al.*, 220 F. 2d 49) this Court said relative to facts somewhat paralleling those in the case at bar:

“* * * From what has been said hereinbefore of the history of the holiday detector art, a reading of these claims raises the inquiry whether the Stearns patent is for a combination of old elements; and, indeed, appellants concede that the elements are old. * * *”

* * * * *

“Without the support of the subsidiary findings which we hold are clearly erroneous, the finding of the court below that the combination of old elements in the Stearns patent does not amount to patentable invention because the elements thereof do not cooperate in

any new way or contribute any new and unexpected result must also fall. The elements of the Stearns combination do functionally operate differently in the combination than they did in their old surroundings. * * * And this different coaction of the elements produces a new and useful result, viz.: The detection of holidays in a more facile and efficient way *Willard v. Union Tool Co.*, 9 Cir., 253 F. 48, 54; *Long v. Dick*, D.C. Cal., 38 F. Supp. 214, 220; *Application of Ostermann*, 179 F. 2d 1010, 1014, 37 C.C.P.A., Patents, 891, *Imperial Brass Mfg. Co. v. Bonney Forge & Tool Works, Inc.*, D.C. Pa., 38 F. Supp. 829, 830; 69 C.J.S., Patents, § 68, page 303; 40 Am. Jur., Sec. 19, p. 543.”

See also:

Pacific Contact Laboratories, Inc., et al. v. Solex Laboratories, Inc., 209 F. 2d 529 (C.A. 9, 1953);

Cutter Laboratories, Inc. v. Lyophile-Cryochem Corporation, 179 F. 2d 80 C.A. 9, 1949);

Ralph N. Brodie Co., et al. v. Hydraulic Press Mfg. Co., 151 F. 2d 91 (C.A. 9, 1945);

Halliburton Oil Well Cementing Co. v. Walker, et al., 146 F. 2d 817 (C.A. 9, 1944).

The *Kwikset Locks* case¹⁹ is not authority for “lack of patentable invention” under the facts of the case at bar. In the *Kwikset Lock* case, not only was the “deadlatch mechanism to be found in the prior art” but it was also shown to have been applied to direct action rocker-type locks. All the patentee did was to apply it to a reverse action rocker-type lock. The Court, after stating that the “principle upon which the deadlatching mechanism operates is no different if used in conjunction with a direction action

¹⁹*Kwikset Locks, Inc. v. Hillgren*, 210 F. 2d 483 (C.A. 9, 1954).

on reverse rocker-type lock'', held such a minor advance to lack patentable invention.

The facts of that case and the case at bar are fundamentally different because in the *Kwikset Locks* case there was no entirely new entity having new functions and producing new or different results.

Obviously, in the case at bar the Trial Court based its decision upon an erroneous concept that patentable invention cannot reside in a new entity when the mechanical parts thereof can be separately found in analogous and non-analogous prior devices despite the fact that the latter do not and are not intended to nor capable of accomplishing either the function or results of the new entity. In other words, the District Court by the use of hindsight not only of necessity had to reconstruct the various parts of the new entity separately found in the art and give them new and additional functions, but had to assemble them into a new assemblage in the light of the invention as a basis for holding lack of novelty and patentable invention. This method of finding lack of invention is improper in that this Court has held that under circumstances similar to those of the case at bar, prior patents "cannot be reconstructed in the light of the invention of the patent in suit, and then used as a part of the prior art." *Payne Furnace & Supply Co. v. Williams-Wallace Co.*, C.A. 9, 1941, 117 F. 2d 823, 826; *Bianchi v. Barili*, C.A. 9, 1948, 168 F. 2d 793, 796; *Brown & Sharp Mfg. Co. v. Kar Engineering Co.*, C.A. 1, 1946, 154 F. 2d 48, 53.

Clearly, from the above, there is no prior disclosure containing the essential elements and functions of the patented structure. The patented structure—

- (a) is substantially novel in construction
- (b) has substantially new functions and abilities
- (c) obtains new or at very least vastly improved results.

This, combined with the substantial step forward it accomplished in the art, spells patentable invention.

(D) THE DEVICE OF THE PATENT IN SUIT IS NOT AN "AGGREGATION" AS THAT TERM IS USED IN PATENT LAW.

An unpatentable aggregation is taking several old things and joining them together, each separately performing its old function without modifying the function of the remainder so that the result is merely the sum of the separate operations. An excellent example is set forth in the following case:

Lane-Wells Co. v. M. O. Johnston Oil Field Service Corporation, 181 F. 2d 707 (C.A. 9, 1950).

In this case the Court described the patented device as follows:

"It is conceded that all of the separate elements of the tool described in the patent claims, the packer, the gun mechanism for perforating the well casing and the sample receiver, were old and well known in the art at the time Lane first made his formation tester. * * *"

The separate elements were formerly separately run into the well and all that was done in the patent was to connect these three old elements together so they could be run in the well at one time and then operate in succession precisely as they had been operated separately prior to that time. There was a great saving in drilling time but no other advantage.

The Court, in holding the claims invalid on the grounds of aggregation rather than combination, stated as follows:

“It is also our conclusion that the Lane device constituted only a bringing together in juxtaposition of old and well known elements; that whatever advantageous results were thus accomplished were not different in character from the aggregate results of the old tools; and that in the Lane device there was lacking that mutuality of action, that joint, cooperative functioning of the old elements to produce a new and different result, which is essential to raise a mere aggregation to the level of a patentable combination.”

In that case neither the parts nor their functions were changed or modified by aggregating them and no new result was produced. Certainly, in the case at bar there is complete mutuality of action and joint cooperative function to produce the new unitary result.

(E) THERE IS NO ISSUE OF INFRINGEMENT.

As before set out in this brief, there is no issue of infringement because the only evidence is that the accused device is a precise copy of the patented structure as described and claimed in the patent in suit. The District Judge recognized this by saying (R. 206):

“The Court: I asked you to get your view of it, because it would seem to me that although I have submitted the question of validity along with infringement to a jury before, the only question really in these cases, so far as I have been able to see in most cases, anyway, that calls for the trier of fact to act is the infringement issue.

“In that respect in this case if there is validity of the patent, I think the Court would have to instruct the jury that there was infringement, because I do not think that reasonable minds could differ that there is any difference between the two devices. * * *”

Again at R. 224:

“* * * If this patent is valid, then the plaintiff is entitled to a judgment because I think as a matter of law there is just no question about there being infringement. It doesn't take a Philadelphia lawyer to see that that is so. Counsel haven't made any point about that. This case depends upon the validity of the patent.”

CONCLUSION.

The patented invention has presented a structure which enhanced the scaffolding art with a new conception in scaffolding, having new abilities, which patented structure is a new entity having new and additional functions and producing new, or at the very least, greatly improved results, and which operates differently from anything in the prior art.

The patented invention, based on facts which are not in controversy, has been shown to meet every test of invention as laid down by this Court.

It is, therefore, respectfully submitted that the District Court was in error in holding the patent invalid as not being a patentable invention; that the judgment of that Court should be reversed in order that the production of a very

meritorious invention may be rewarded with the protection provided for by our patent laws.

Dated, San Francisco, California,
May 26, 1955.

Respectfully submitted,

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No. 14,617

United States Court of Appeals
For the Ninth Circuit

UP-RIGHT, INC., a corporation, and
WALLACE J. S. JOHNSON,
Appellants,

VS.

PATENT SCAFFOLDING CO., INC.,
a corporation,
Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

REPLY BRIEF OF APPELLEE,
PATENT SCAFFOLDING CO., INC., A CORPORATION.

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Subject Index

	Page
Statement	1
Plaintiffs have failed to comply with Rule 19(6), Rules of U. S. Court of Appeals for the Ninth Circuit.....	3
Defendant-appellee's position	4
The elements of the claim in suit.....	4
The prior art patents show every element of the claim, working in the same way and producing the same result	5
Argument	9
I. The language of the claim herein does not set forth any patentable combination.....	9
Conclusion	16

Table of Authorities Cited

Cases	Pages
Adams v. Bellair Stamping Company, 141 U.S. 539, 35 L. Ed. 849	16
Altoona v. American et al., 294 U.S. 477, 79 L. Ed. 483....	18
Atlantic Works v. Brady, 107 U.S. 192, 27 L. Ed. 438.....	13
Bank of America v. Commissioner of Internal Revenue (9th Cir.), 126 F. 2d 48.....	4
Bean v. Smallwood, 2 Story 408.....	13
John Bean Mfg. Co. v. Creagmile (9th Cir.), 123 F. 2d 182	19
Benfield v. Potts & Co. (CCA 6), 126 Fed. 475.....	2
Bingham Pump Co., Inc. v. Edwards (9th Cir.), 118 F. 2d 338.....	18
Concrete Appliances Co. v. Gomery, 269 U.S. 177, 70 L. Ed. 222.....	13, 19
Cuno Engineering Corp. v. Automatic D. Corp., 314 U.S. 84, 86 L. Ed. 58.....	13
Dallas Machine & Locomotive Works v. Willamette-Hyster Co. (9th Cir.), 112 F. 2d 623.....	11
Electric Cable Joint Co. v. Brooklyn Edison Co., 292 U.S. 69	18
Fernandez v. Phillips (9th Cir.), 136 F. 2d 404.....	13
Grant v. Walter, 148 U.S. 547, 37 L. Ed. 552.....	18
Great A. & P. Tea Co. v. Supermarket Equip. Corp., 340 U.S. 147, 95 L. Ed. 162.....	12, 16, 17
Grinell Washing Machine Co. v. Johnson Co., 247 U.S. 426, 62 L. Ed. 1196.....	17
Hailes v. VanWormer, 87 U.S. 353, 22 L. Ed. 241.....	16
Himes v. Chadwick (9th Cir.), 199 F. 2d 100.....	17
Hollister v. Benedict Mfg. Co., 113 U.S. 59.....	13, 18
Hotchkiss v. Greenwood, 11 How. (U.S.) 248.....	13
Humphreys Gold Corp. v. Lewis (9th Cir.), 90 F. 2d 896..	4
Kwikset Locks v. Hilgren (9th Cir.), 210 F. 2d 483.....	17, 18
Lincoln Engineering Co. v. Stewart-Warner Corp., 303 U.S. 545, 82 L. Ed. 1008.....	16, 17
Lovell Manufacturing Co. v. Cary, 147 U.S. 623, 37 L. Ed. 307.....	13

TABLE OF AUTHORITIES CITED

iii

	Pages
Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 44 L. Ed. 586	19
McClain v. Ortmyer, 141 U.S. 419, 35 L. Ed. 800.....	18
Miller et al. v. Force et al., 116 U.S. 22, 29 L. Ed. 552.....	19
Mutual Life Insurance Co. v. Wells Fargo (9th Cir.), 86 F. 2d 585	4
Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co., 174 U.S. 492, 43 L. Ed. 1058.....	16
Peters v. Hanson, 129 U.S. 541, 32 L. Ed. 742.....	13
Phillips v. Detroit, 111 U.S. 604.....	13
Reckendorfer v. Faber, 92 U.S. 347.....	11, 13, 16
Roberts v. Ryer, 91 U.S. 150, 23 L. Ed. 267.....	19
Simplex Wrapping Mach. Co. v. Schultz et al. (CCA 9, 1942), 128 F. 2d 138.....	12
Smith v. Magic City, 282 U.S. 784, 75 L. Ed. 707.....	18
Smith v. Nichols, 21 Wall. 112, 88 U.S. 112, 22 L. Ed. 566	18
E. R. Squibb & Co. v. Mallinckrodt Chemical Works (8th Cir.), 69 F. 2d 685.....	4
Stoody v. Mills Alloys, Inc. (9th Cir.), 67 F. 2d 807.....	2
Thompson v. Boisselier, 114 U.S. 1.....	13
Toledo Pressed Steel Co. v. Standard Parts, 307 U.S. 350, 87 L. Ed. 1334.....	11
Upright v. Patent Scaffolding Co., Inc., U.S.D.C. Civil Action 229484	14
Vandenburg v. Truscon Steel Co., 261 U.S. 6, 67 L. Ed. 507	19
Wilson-Western Sporting Goods Co. v. Barnhart (9th Cir.), 81 F. 2d 108.....	18

Statutes

New Patent Act, Section 103.....	12
35 USCA Section 31, RS Section 4886.....	13

No. 14,617

**United States Court of Appeals
For the Ninth Circuit**

UP-RIGHT, INC., a corporation, and WALLACE J. S. JOHNSON, vs. PATENT SCAFFOLDING CO., INC., a corporation,	}	<i>Appellants,</i> <i>Appellee.</i>
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**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

**REPLY BRIEF OF APPELLEE,
PATENT SCAFFOLDING CO., INC., A CORPORATION.**

STATEMENT.

The appeal herein is by plaintiffs from the judgment for defendant adjudging the Johnson patent No. 2,618,496, to be invalid, entered on the decision and findings of Judge Louis E. Goodman.

The action herein is at law for damages for infringement of the said Johnson patent, granted No-

vember 10, 1952. The original complaint was filed in December, 1952, long after defendant's first sale of its device, later charged to infringe, without any prior notice to defendant of any kind—plaintiffs' devices being unmarked as to patent pending, or with the patent notice. Failure in the original complaint to allege notice was fatally defective to maintaining an action at law for damages. So, plaintiffs had to file an amended complaint alleging therein for the first time notice which was given only by the commencement of the action.

In the answer to the amended complaint, it was asserted that the patent in suit was void for lack of invention (Par. 11, R. 12), invalid for lack of patentable combination (Par. 6, R. 10), that the question in this case is one of law and not of fact; that there cannot be a conflict as to the facts in view of the simplicity of the structures, and that damages must be proven. (Par. 9, R. 11.) See *Benfield v. Potts & Co.* (CCA 6), 126 Fed. 475 at p. 485.

The principal defense was that said patent was invalid because the essential elements of the single claim were well known in the prior art, with nothing new in their functioning added. (R. 16-20.) Defendant's evidence was directed entirely to this issue and consisted of references to and analysis of the prior art patents (R. 292-346, 123-155), other than those mentioned as "File Wrapper References" of the patent in suit (R. 235). The *prima facie* presumption of validity otherwise attaching to the patent in suit was thereby eliminated from this case. See *Stoody v.*

Mills Alloys, Inc. (9th Cir.), 67 F. 2d 807. On this evidence the Court below held that “all of the elements aggregated by plaintiffs’ function as taught in the prior art patents”, that “plaintiffs did not change nor bring to light anything new in the functioning of these elements” (R. 13-14), and then concluded that “the result is aggregation and not a patentable combination”. (R. 14.) The foregoing determination is amply supported by the facts as to the prior art found in patents long antedating the patent in suit and by the law applicable thereto.

**PLAINTIFFS HAVE FAILED TO COMPLY WITH RULE 19(6),
RULES OF U. S. COURT OF APPEALS FOR THE NINTH
CIRCUIT.**

Appellants’ Statement of Points (R. 228) under this rule is confined to general assertions that the District Court erred: (1) “in holding” the patent in suit “invalid and void”; (2) “in not holding” it “good and valid”; (3) “in not holding” infringement by defendant; (4) “in holding” plaintiffs “not entitled to recover damages”; and (5) “in not granting” the prayed for relief. This amounts to nothing more than saying that the judge erred in holding the patent invalid. Appellants’ failure to specify the points upon which they rely upon this appeal is not cured by the recital of “Specification of Errors” for the first time in their brief on appeal. (Pl. Br. 6-8.) Nor have appellants complied with Rule 19(6) requiring that they designate the parts of the record which

they think necessary for consideration of their points. These omissions have been held fatal. (*Humphreys Gold Corp. v. Lewis*, 9th Cir., 90 F. 2d 896, 898-9; *Bank of America v. Commissioner of Internal Revenue*, 9th Cir., 126 F. 2d 48, 52; *Mutual Life Insurance Co. v. Wells Fargo*, 9th Cir., 86 F. 2d 585, 587; *E. R. Squibb & Co. v. Mallinckrodt Chemical Works*, 8th Cir., 69 F. 2d 685, 687.)

DEFENDANT-APPELLEE'S POSITION.

It is contended for the appellee:

(1) The language of the claim herein does not set forth any patentable combination.

(2) The patent claim herein does not set forth any structural features constituting invention, in the light of the prior art.

THE ELEMENTS OF THE CLAIM IN SUIT.

The Johnson patent in suit sets forth in its single claim the following four elements:

(1) *A vertical tubular outer supporting leg member (16) terminating at its lower end in a plurality of downwardly extending outwardly radially biased resilient fingers (20) integral therewith;*

(2) *An inner member (17) telescopically received within the outer member (16), said inner member (17) having an upper cylindrical bearing portion (23) engaging a complementary portion of said outer*

supporting leg member (16) and having an externally threaded lower portion (threads 17a);

(3) *A segmental internally threaded nut (21) fixedly secured to said fingers (20) for threaded engagement with the threaded portion (threads 17a) of the inner member (17) when the fingers (20) are forced inwardly; and*

(4) *A collar (24) on the outer member (16) movable relative to the nut (21) to force the fingers (20) inwardly to place the nut (21) into threaded engagement with the threads (17a) of the inner member (17) and to retain such engagement until the collar (24) is moved relative to the nut (21) to permit the fingers (20) to move radially outwardly, the length of the threaded portion of the inner member (17) being substantially greater than the length of the threaded portion of the nut (21).*

THE PRIOR ART PATENTS SHOW EVERY ELEMENT OF THE CLAIM, WORKING IN THE SAME WAY AND PRODUCING THE SAME RESULT.

The practical art utilized a cylindrical bearing portion on an inner leg member engaging a complementary portion of an outer supporting leg member to prevent lateral deflection, as in the Uecker patent No. 2,203,114. (Def. Ex. E; R. 301; Findings VII, XII and XVII; White Test. R. 128.) The said Uecker patent also preempts the novelty of an adjustable leg for a scaffold structure (as does also Uecker patent No. 2,043,498; R. 250). The adding

of the split nut of Michelin patent No. 750,675 (Def. Ex. L; R. 334), by one skilled in the art, to obtain a fine and coarse adjustment to the anti-wobbling device of Uecker No. 2,203,114 (Def. Ex. E), is a substitution, following the process of reasoning of any good mechanic without more.

Split fingers on a slotted outer tubular leg, engaging a telescopic inner leg member with a clamping ring readily substitutable for the screw connection of Uecker, were disclosed prior to the patent in suit by Athans No. 1,679,017. (Def. Ex. D; R. 293; Findings VII, XII, XIII and XIV; White Test. R. 123.) Also prior are many collar controlled inwardly threaded split nuts engaging outwardly threaded telescopic inner members, as in the simple connection of the Countryman patent No. 1,912,475 (Def. Ex. F; R. 305; Findings VII, XII, XIII, XIV, XV and XVIII; White Test. R. 129), which, in Figs. 6 and 7, present every element of the combination (R. 171) and which has both coarse and fine adjustments.

Of such common knowledge is an interiorly threaded jaw engaging a telescopic outwardly screw-threaded inner member within the confinement of a clamping collar, generally called in this case a "split nut," that it found application to calipers as early as 1886 in Stevens No. 351,474 (Def. Ex. I; R. 324); Findings VII, XIII, XV and XVIII; White Test. R. 140); to a yoke, as in Mapes No. 654,512 (Def. Ex. M; R. 339; Findings VII, XV and XVIII; White Test. R. 154); to a screw clamp, as in Taylor No. 747,270 (Def. Ex. G; R. 315; Findings VII, XV

and XVIII; White Test. R. 153); and to gun wipers, as in Birch No. 210,235 (Def. Ex. K; R. 331; Findings VII and XV; White Test. R. 143). In all of these, the inner leg member may be moved any spaced distance when the threaded jaws are open, until they are again closed.

Unrestrained vertical adjustability of mechanically cooperating parts, such as an internally threaded split nut for threaded engagement with an externally threaded inner member, and having the same function and results as the corresponding element claimed in the patent in suit, is also found in Hinckley, showing a mechanism for operating and feeding oil well drills, including:

(1) The telescoping of one member into the other, the outer leg member B terminating in a plurality of extending resilient fingers at its lower end and integral therewith (B with fingers C integral therewith);

(2) An inner member A received within the outer member B having a bearing portion (the portion e) engaging a complementary portion of the outer leg member B and having an externally threaded lower portion A;

(3) A split internally threaded nut inside fingers or jaws C fixedly secured to said fingers or jaws C for threaded engagement with the threaded portion of the inner member A (the nuts are part of the end of B immediately below the reference character C when the fingers or jaws C move inwardly); and

(4) A collar a, on the outer member movable relative to the nut to force the fingers inwardly to place the nut into threaded engagement with the threads of the inner member and to retain such engagement until the collar a is moved relative to the nut to permit the fingers or jaws C to move radially outwardly, the length of the threaded portion of the inner member being substantially greater than the length of the threaded portion of the nut (see Findings VII and XV; White Test R. 135-137).

The Hinckley structure permits a coarse and a fine adjustment (R. 139).

The cylindrical bearing portion of the inner supporting leg member of the claim in suit is also clearly disclosed in the Moore patent No. 2,184,358 (Def. Ex. N; R. 344). In the Moore structure, the bearing portion 19 of the inner leg member engages a complementary portion of the outer leg member, the inner leg member also being engageable by the split and slotted collar having radially contractible and expansible jaws (Rec. p. 345, Col. 1, lines 47-53). Thus, the cylindrical portion 19 of the Moore patent is the anti-wobbler device, and the mechanism 13 is the jaw-clutch device (Findings VII, XII, XIII, XVI and XVII, White Test. R. 150-152), each operating separately from the other. Moore recites, in claims 3 and 4 (R. 346), that "the exterior diameter of the inner member for the major portion of its length being less than the interior diameter of the outer member" (line 21); and, as is clearly shown in the

drawing of this Moore patent, the recited major portion is the lower portion of the inner member—exactly as in the structure of the claim in issue. The patentee also there states (R. 345, Col. 2, lines 31-34) that “Preferably element 19 [the enlarged upper portion of the inner leg member] has a snug sliding fit within [outer] leg member 6 and cooperates therewith for guiding and bracing the leg members 6 and 7.” In other words, this Moore patent provides a structure which permits rough vertical adjustment and, at the same time, prevents lateral wobbling. Since, for example, Michelin patent No. 750,675 (Def. Ex. L; R. 334; Findings VII and XV; White Test. R. 144) shows the split nut locking structure of Johnson, the substitution of the Michelin split nut for the Moore split collar is obvious to any mechanic skilled in the art. This is especially significant in view of appellant’s conceding the antiquity of all the elements of the claim in their construction, stating “each individual mechanical part of which is found to be separately old in various prior art devices.” (Brief, p. 5.)

ARGUMENT.

I.

THE LANGUAGE OF THE CLAIM HEREIN DOES NOT SET FORTH ANY PATENTABLE COMBINATION.

Before this Court reaches the question of “invention,” we submit it should consider whether a patentee must show that there is present such assemblage

of mechanical parts which cooperate under known rules of law as to establish a combinative subject matter. Merely placing such parts into juxtaposition, allowing each part to work out its own law of action separately from and independently of the other, in non-unitary functions, means, and result, is like an eraser at the end of a pencil. It is as empty of result in patent law as proof at trial by incompetent evidence, which is no evidence at all, and which is not entitled to any consideration, whether or not the question of competency has been raised.

While the claim of the patent in suit (Pl. Ex. 1; R. 231) presents a leg structure, to-wit, the elongated inner member having a cylindrical bearing, and an enclosing structure which prevents wobbling, and, elsewhere, a split nut clutch structure engaging the exteriorly threaded leg, it is significantly silent as to any mechanical cooperation between those structures. Quite obviously, the elongated bearing, to give greater bearing surface to prevent wobbling, is a mechanical structure which operates entirely independently of any clutch action to clamp the outer leg member to the inner leg member; and the clamping or unclamping of the split nut certainly does not require an elongated bearing for the leg. These are two entirely different categories of structure, and their assemblage can only be a mere addition of the function of the respective structures, each operating as if the other were not present. There is no merging of such functions, inseparably coupling the functions into a resulting force. This complete independence and non-unitary action of structural functions, each

function like that in the prior art, results in the failure to bring into being a "combination."

In the single claim of the patent in suit, there is absence of patentable "combination." The claim was for an adjustable leg, on the fallacious assumption that an adjustable leg was new *per se*. Adjustable legs have long been known. There is, therefore, no physical structure set forth in the claim conforming to the requirements of a combination. In the absence of a combination, it is not necessary to consider the question of invention.

The mere addition of the old anti-wobbler device to the old clutch device fails to present a patentable invention. Just as in the rubber tip lead pencil case (*Reckendorfer v. Faber*, 92 U. S. 347), where the rubber merely acted as an eraser, and the pencil merely as a writing instrument unaffected by the eraser, so here the old collar-controlled jaws engage the outwardly threaded inner leg member to lock the inner leg member in position, working the same way for different adjustments whether the old anti-wobbling unthreaded portion of the inner leg member is present or not. Either might have been claimed, if new; but there is no patentable combination in the addition of one to the other.¹

¹"* * * They performed no joint function. Each served as separately it had done. The patented device results from mere aggregation of two old devices, and not from invention or discovery." (*Toledo Pressed Steel Co. v. Standard Parts*, 307 U.S. 350, 356, 87 L. Ed. 1334, 1338.)

"The conjunction or concert of known elements must contribute something; only when the whole in some way exceeds the sum of

II.

We have heretofore segregated in their respective categories the mechanical elements of the patent in suit and of each prior art patent (Findings XV-XIX; R. 18-20). Where, as here, such facts are not disputed, there can be no issue of fact. By anticipation the patent in suit becomes invalid without more, as being within a suitable range of equivalents (See Finding VII of the Findings of Fact; also Section 103 of the New Patent Act).

Assuming without conceding that there is a difference between the structure of the claim of the patent in suit and the structures of the prior art, does such difference constitute invention or mere mechanical skill?

Assuming that this Court reaches the question of invention, there follows the need for selecting the applicable legal principles from a galaxy of rules of long acceptance. The mere carrying forward of the original thought, a mere change in proportions or degree, is not invention. Merely exercising the skill of the calling, or simple reasoning within the calling is not invention, since a new effect in kind is not pre-

its parts is the accumulation of the old devices patentable.” (*Great A. & P. Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 152, 95 L. Ed. 162, 166.)

“* * * patented device results from mere aggregation of two old devices, and not from invention or discovery.” (*Simplex Wrapping Mach. Co. v. Schultz et al.* (CCA 9, 1942), 128 F. 2d 138, 140.)

sented.² One cannot withdraw a thing from the circle of what was known before, which belongs to the public, and interdict its use by the public. Adjustability is not invention (*Peters v. Hanson*, 129 U. S. 541, 32 L. Ed. 742). A new use of the same structure as disclosed in the prior art is not invention (Justice Story in *Bean v. Smallwood*, 2 Story 408; *Fernandez v. Phillips* (9th Cir.) 136 F. 2d 404, 406).

2“‘It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures.’” (*Atlantic Works v. Brady*, 107 U.S. 192, 199, 27 L. Ed. 438, 441.)

“‘Within the rule laid down by this court in *Hollister v. Benedict Mfg. Co.*, 113 U.S. 59, there was nothing more than mechanical skill in arriving at the alleged invention, in view of the state of the art. * * * The principle deductible from these cases * * * is that it is not a patentable invention to apply old and well known devices and processes to new uses, in other and analogous arts.’” (*Lovell Manufacturing Co. v. Cary*, 147 U.S. 623, 635, 636, 637, 37 L. Ed. 307, 311, 312.)

“* * * Under the statute (35 USCA Sec. 31, RS Sec. 4886) the device must not only be ‘new and useful’, it must also be an ‘invention’ or ‘discovery’. *Thompson v. Boisselier*, 114 U.S. 1, 11. Since *Hotchkiss v. Greenwood*, 11 How. (U.S.) 248, 267, decided in 1851, it has been recognized that if an improvement is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art. (Citing cases.) ‘Perfection of workmanship, however much it may increase the convenience, extend the use, or diminish expense, is not patentable.’ *Reckendorfer v. Faber*, 92 U.S. 347, 356, 357. The principle of the *Hotchkiss* case applies to the adaptation or combination of old and well known devices for new uses. *Phillips v. Detroit*, 111 U.S. 604; *Concrete Appliances v. Gomery*, 269 U.S. 177; and other cases cited. That is to say, the new device, however useful it may be, must reveal the flash of creative genius not merely the skill of the calling. If it fails, it has not established its right to a private grant on the public domain.” “More must be done than to utilize the skill of the art in bringing old tools into new combinations.” (*Cuno Engineering Corp. v. Automatic D. Corp.*, 314 U.S. 84, 90, 86 L. Ed. 58, 62, 63.)

“Lack of patentable invention is here plain and commercial success, however great, cannot serve to sustain the patent.” (*Fernandez v. Phillips et al.* (9th Cir.), 136 F. 2d 404, 406.)

Appellants persist in arguing as if the features of their completed commercial product—the aluminum rolling ladder-type scaffold—were coextensive with the claim of the patent in suit and attributing thereto the alleged commercial success thereof (Brief, pp. 3, 9, 10-18; but see R. 89-90). However, their completed commercial product admittedly has many more features—all within the realm of common mechanical skill—than those set out in the rather limited patent claim herein. In fact, it embodies all the features of their earlier patent No. 2,438,173, involved in prior litigation, wherein these plaintiffs claimed great success for their aluminum collapsible ladder-type rolling scaffold, without the “gadget” of the patent in suit (R. 72-89; see, also, *Upright v. Patent Scaffolding Co., Inc.*, U.S.D.C. Civil Action 229484). So, it does not seem reasonable to attribute commercial success to the “gadget” of the patent in suit merely because it was part of the entire aluminum scaffold.

Obviously, it is the claim itself which is controlling in the determination of the controversy herein, and which alone was and could be the deciding factor before the court below. So, the enumeration by Johnson of various features of the completed commercial structure (Brief, pp. 11-13) and the elaborate argument of their counsel based thereon, with the constant reiteration of such terms and phrases as “patented structure” (Brief, pp. 5, 8, 9, 10, 13, 14), “patented device” (Brief, pp. 10, 27), “new functions” and “new results” (Brief, p. 17), “new entity” (Brief, pp. 5, 27), “new unitary result” (Brief,

p. 42), without being specific, is really the setting up of a straw man, destroyed by simple reference to the language of the claim of the patent herein. In the light of the prior art, it is apparent that appellants merely selected desirable features or expedients old in the art and incorporated them in a single device without the exercise of the inventive faculty or the production of any new or unexpected result.

Much is made of the "functions" and "results" of appellants' assemblage (Brief, pp. 16-17). However, the most that can be and is claimed by appellants is some saving in time in adjusting the leg (Brief, p. 16 bot.), but no other advantage. Such was the fact in the non-invention *Lane-Wells* case, referred to by appellants (Brief, p. 41). Appellants cannot escape the lower court's conclusion that there was nothing new in the "functions" and "results" of each of the elements of their claim, conceded to be old, for it is apparent that a construction in which the threaded jaws, moved by the collar against the threaded inner spindle, hold the spindle from falling out and allow for a fine adjustment between the threaded portions, really provides for no more than is inherent in every screw threaded connection.

The hornbook formula, new construction, new function and new result, frequently repeated in appellants' brief, lacks evidentiary support in the Record. Old devices put to a new use are of no value in contributing to the question of invention. So, there is no evidence in this case to support the many formulary statements made, the argumentative assertions being

free from references to the Record. Johnson's "requisites" for appellants' device (Pl. Br., p. 11) reveal the mind of a designer or mechanic and not the imagination of an inventor. Neither is there evidence to support such statements in the Brief as "new conception" (p. 3), "customers demanded it" (pp. 3, 9), "an innovation" (p. 5), "long standing void" (p. 8), "immediate success" (pp. 8, 10), "new abilities" (pp. 5, 43).

Appellants' criticism of the lower court for not saying the unnecessary is unfounded (Brief, pp. 4, 8 and 25).

CONCLUSION.

Over the years the Supreme Court has clearly set forth with constancy the standards of invention which must be met to sustain a patent for a combination of old elements. Invention, as distinguished from mechanical skill, is a requisite.

1. Where, as in the present case, all of the elements making up the claims are old and long known, the assemblage of such elements must produce some new or different functions of the elements, and a novel result as the joint product of the assemblage, otherwise there is no patentable combination and the patent is invalid.³ The various elements of the Johnson claim are found in the prior art doing the same

³*Adams v. Bellair Stamping Company*, 141 U.S. 539, 542, 35 L. Ed. 849, 851; *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Co.*, 340 U.S. 147; *Reckendorfer v. Faber*, 92 U.S. 347, 357, 23 L. Ed. 719; *Hailes v. VanWormer*, 87 U.S. 353, 368, 22 L. Ed. 241; *Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co.*, 174 U.S. 492, 498, 43 L. Ed. 1058; *Lincoln Engineering Co. v.*

work as they do in the patentee's assemblage. Telescoping leg members are found in Athans, Countryman, Moore and both Uecker patents; the resilient fingers on the outer telescopic leg member are disclosed in Athans; a cylindrical bearing portion on the inner leg member is found in Moore and Uecker 2,203,114; the split nut-contracting collar combination is found in Countryman, Michelin, Moore, Hinckley, Burns and Stephens. Each element of the Johnson aggregation and its corresponding device of the prior art function in identically the same manner, with nothing new added by Johnson to the sum total of the parts.

2. There is no invention in the mere aggregation of a number of old parts or elements, nor in the accumulation of old devices which do not in some way exceed the sum of its parts.⁴ No new function or result follows from Johnson's aggregation, each element functions in its accustomed manner in the assemblage, and "the whole does not exceed the sum of its parts."

3. To be a patentable combination an assemblage of old devices or elements must create what had not

Stewart-Warner Corp., 303 U.S. 545, 549, 82 L. Ed. 1008; *Grinell Washing Machine Co. v. Johnson Co.*, 247 U.S. 426, 62 L. Ed. 1196; *Dallas Machine & Locomotive Works v. Willamette-Hyster Co.* (9th Cir.), 112 F. 2d 623, 627; *Himes v. Chadwick* (9th Cir.), 199 F. 2d 100, 106; *Kwikset Locks v. Hillgren* (9th Cir.), 210 F. 2d 483, 486.

⁴*Great Atlantic & Pacific Tea Co. v. Supermarket etc.*, 340 U.S. 147, 152, 95 L. Ed. 162; *Lincoln Engineering Co. v. Stewart-Warner*, 303 U.S. 545, 549, 82 L. Ed. 1008; *Pickering v. McCullough*, 104 U.S. 310, 318, 26 L. Ed. 749; *Himes v. Chadwick* (9th Cir.), 199 F. 2d 100, 106; *Kwikset Locks v. Hillgren* (9th Cir.), 210 F. 2d 483, 486.

before existed to bring about what lay hidden from vision in a way that can be distinguished from mechanical skill.⁵ Johnson's aggregation has not created something which did not exist previously. Athans, Moore and Countryman all show supporting legs having relatively adjustable inner and outer telescopic leg members secured in fixed positions by clutch means. Even the specific type of clutch means used by Johnson was well known long prior to his filing date. Again Johnson has failed to meet the test of a patentable combination required to sustain validity.

4. A mere advance in efficiency and utility is not sufficient to convert a non-inventive aggregation into a patentable combination.⁶ Nor is the mere exercise of the skill in the calling, or an advance plainly indicated by the prior art.⁷ Nor is the mere carrying forward or more extensive application of the original thought, a change in form, proportions or degree, or doing substantially the same thing in the same way by substantially the same means with better results.⁸

5. The mere application of a mechanical equivalent found in the prior art to another use is not in-

⁵*Hollister v. Benedict & Burham Mfg. Co.*, 113 U.S. 59, 72, 28 L. Ed. 901; *McClain v. Ortmyer*, 141 U.S. 419, 427, 35 L. Ed. 800; *Kwikset Locks v. Hillgren* (9th Cir.), 210 F. 2d 483, 486.

⁶*Smith v. Nichols*, 21 Wall. 112, 88 U.S. 112, 119, 22 L. Ed. 566; *Grant v. Walter*, 148 U.S. 547, 37 L. Ed. 552; *Kwikset Locks v. Hillgren* (9th Cir.), 210 F. 2d 483, 486.

⁷*Altoona v. American et al.*, 294 U.S. 477, 79 L. Ed. 483; *Electric Cable Joint Co. v. Brooklyn Edison Co.*, 292 U.S. 69, 79, 80; *Smith v. Magic City*, 282 U.S. 784, 75 L. Ed. 707.

⁸*Smith v. Nichols*, supra; *Bingham Pump Co., Inc. v. Edwards* (9th Cir.), 118 F. 2d 338, 340; *Wilson-Western Sporting Goods Co. v. Barnhart* (9th Cir.), 81 F. 2d 108, 110.

vention.⁹ Utilizing the well known split nut-contracting collar,—a common expedient found extensively in the prior art—to secure the adjustable telescoping inner and outer leg members of Athans against relative displacement does not amount to a patentable combination, nor would the lengthening of Michelin's outer telescopic member, as taught by Athans, Countryman, and Moore, attain the dignity of a patentable invention.

6. In this case there is no presumption of the validity of the appellants' patent for the reason that the file wrapper of the patent in suit indicates that the prior art proven in this case by the defendant was not before, nor was it considered by the Patent Office examiner.

The judgment herein should be affirmed.

Dated, San Francisco, California,

July 25, 1955.

Respectfully submitted,

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⁹*Vandenburg v. Truscon Steel Co.*, 261 U.S. 6, 15, 67 L. Ed. 507, 512; *John Bean Mfg. Co. v. Creagmile* (9th Cir.), 123 F. 2d 182, 185; *Roberts v. Ryer*, 91 U.S. 150, 157, 23 L. Ed. 267; *Concrete Appliances Co. v. Gomery*, 269 U.S. 177, 185, 70 L. Ed. 222; *Miller et al. v. Force et al.*, 116 U.S. 22, 29 L. Ed. 552; *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 493, 44 L. Ed. 586.

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**United States Court of Appeals
For the Ninth Circuit**

UP-RIGHT, INC., a corporation, and
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Appellants,

vs.

THE PATENT SCAFFOLDING CO., INC.,
a corporation,
Appellee.

**REPLY BRIEF ON BEHALF OF APPELLANTS,
UP-RIGHT, INC. AND WALLACE J. S. JOHNSON.**

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

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Subject Index

	Page
Preliminary	1
Appellants have complied with Rule 19(6) of this court.....	4
As to appellee's argument that the patented device lacks patentable invention	4
Rebuttal as to assertions in appellee's brief.....	9
Conclusion	10

Table of Authorities Cited

Cases	Page
Patterson-Ballagh Corp., et al. v. Moss, et al., 201 Fed. 2d 403	5

Statutes	
Patent Act of 1952.....	10

Rules	
Rules on Appeal, Rule 19(6).....	4

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PRELIMINARY

On page 2 of appellee's brief appears the following statement:

“* * * The original complaint was filed in December, 1952, long after defendant's first sale of its device, later charged to infringe, without any prior notice to defendant of any kind—plaintiffs' devices being unmarked as to patent pending, or with the patent notice.”

Lest an inaccurate impression be created by that statement, we point to the record facts.

Prior to June 1946, Johnson (appellant), jointly with another, invented a collapsible scaffolding unit (Patent No. 2,438,173, R. 268), which did not have an adjustable leg. Such an element, as an adjustable leg, was necessary to make the scaffolding unit practical and that problem faced Johnson (R. 36). He made an extensive investigation (R. 36) attempting to locate a movable, adjustable leg for such purpose, without success. He thereafter solved the problem by the invention of the patent in suit and appellant commenced manufacturing the scaffold embodying the invention in February 1947 (R. 31) and it was widely successful.

The application for the patent in suit was filed September 15, 1947. From the very beginning, appellants' scaffolds were sold over the entire United States and advertised in nationally distributed trade journals (R. 61), an example of such advertisements being in the record at p. 273. Contrary to appellee's above statement, appellants did give notice of "Patents Pending" as is evident from the advertisement (R. 276).

Appellee abandoned its type of scaffold leg and adopted a "Chinese copy" of the appellants' scaffold leg after appellants' scaffold was a complete success and opened a new phase of scaffolding in that industry (about 1950—see R. 182) and, after competitive demonstrations between appellants' type (embodying the patented invention) and appellee's older type (R. 67). *This is undisputed by appellee.* In fact, appellee attempts to excuse the copying

by saying customers demanded it (R. 182-183). In Mr. Meng's (President of appellee) words:

"Q. When did you first and under what circumstances put this type of leg on a Patented Scaffolding Company device?

A. I would say it would be early in 1950, or about the middle of the year.

Q. Under what circumstances?

A. The reason we put that on is because of the fact that certain government bids were coming through specifying a leg of this type with a quick sleeve action, so that in order to be able to bid on those requirements for the government we had to provide that type of leg, otherwise the bid would not be considered."

Thus appellee copied the patented device nearly two years before the patent issued, during which time, of course, appellants had no cause of action. Immediately when the patent in suit issued, suit was filed. (Patent issued November 18, 1952; suit was filed December 12, 1952.) Appellee seems to complain that no "notice" was given it of the issuance of the patent. (Notice is not a prerequisite to suit except a suit at law for damages only.) Subsequent events demonstrate that a "notice" would have been fruitless in stopping the infringement because the commencement of an infringement suit failed to have such an effect.

**APPELLANTS HAVE COMPLIED WITH RULE 19(6)
OF THIS COURT.**

Appellee asserts that the appellants have failed to comply with Rule 19(6) of this Court. While appellee's exact ground for its assertion is not clear to us, we believe that appellants have complied with such rule as completely as is possible in a patent suit. The Trial Court held as a matter of law that the patent was invalid, and this was assigned as error in the points on appeal.

The usual designation of the parts of the record appellants believed necessary for consideration of the points on appeal was filed (R. 26) and brought to this Court.

The specification of errors was set out in the brief as required to detail the error of the District Court in concluding as a matter of law that the patent is invalid. Certainly, there was concisely and clearly presented the legal question of the validity of the patent in suit to this Court to review.

We do not believe that the cases cited by appellee in support of its proposition are in point.

**AS TO APPELLEE'S ARGUMENT THAT THE PATENTED
DEVICE LACKS PATENTABLE INVENTION.**

The appellee's arguments to the effect that the patented device lacks patentable invention may be divided as follows:

(A) (Pages 5-6 and top of page 7 of appellee's brief).

That each separate mechanical element of the patented device is old and can be separately found in:

- (a) A scaffold leg (Uecker patent);
- (b) A tire valve (Michelin patent);
- (c) A table leg (Athans patent);
- (d) An automobile jack (Countryman patent);
- (e) A caliper (Stevens patent);
- (f) An oil well tool (Mapes patent);
- (g) A carpenter's clamp (Taylor patent); and
- (h) Gun wipers (Birch patent)

despite the fact that none of these devices has the functions of the patented device nor produces its results.

It seems clear that if a new entity has new functions and produces new results, then it must follow that the components of that entity have new or additional functions than they performed in a different entity having different functions and producing different results.

All mechanical elements are old and operate in accordance with a single mechanical principle. Therefore, if all that is needed to find lack of invention in a mechanical device is to find its individual parts to be old without regard to the functioning of the total parts, then no mechanical device could be said to be an invention.

We emphasize that this hindsight reasoning is the basis of the trial Court's conclusion of lack of invention. *The trial Court did not find the device to lack novelty.*

This Court in *Patterson-Ballagh Corp., et al. v. Moss, et al.*, 201 Fed. 2d 403, rejected such reasoning, stating:

“It is quite apparent that simplicity alone will not preclude invention. Hindsight tends to color the seeming obviousness of that which in fact is true contribu-

tion to prior art. 'Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skilful attention.' *Diamond Rubber Co. v. Consolidated Rubber Tire Co.*, 1911, 220 U.S. 428, 435, 31 S. Ct. 444, 447, 55 L. Ed. 527."

(B) (Page 7, second paragraph, to page 8, second paragraph of appellee's brief).

That the entire combination of the patented device is found in the Hinckley patent (R. 328). The Trial Court did not so find nor did appellee's expert witness. In fact, the latter testified that in his opinion the Countryman patent was the closest to the patented device (R. 170-171).

"Q. By the way, Mr. White, of all of these patents that you have brought before us and explained to the jury, which one in particular do you think is most likely the device of the (194) patent in suit in construction and in mode of operation?

A. So far as structure is concerned, the Michelin patent shows all the elements of the clutch mechanism; and so far as operation as a leg is concerned on the general aspects, as I stated before, the Athans patent shows the general adjustment with a different clutch mechanism. Countryman on the jack shows every element of the combination."

However, appellee's expert had to admit that Countryman did not have the functions and could not produce the results of the patented device (R. 168).

“Q. Isn’t it a fact that in the patent to make the fine adjustment they have a gear and a separate nut at a point below which you jacked in the usual fashion to make the fine adjustment?”

A. That is true. But may I add at this time, in order that there is no misunderstanding in the mind of the jury, that fine adjustment was not for the relative movement between the screw and the sleeve.

Q. As a matter of fact, that Countryman patent likewise made (191) no provision for preventing the screw from being screwed out of the nut or those pawls, did it?

A. No.

Q. And it made no provision to stop the wobble of the leg if it were used in a scaffold? I didn’t mean to foreclose you from looking at that view, Mr. White.

A. I have the patent here. No provision; if it wanted to wobble, it could wobble.

Q. That is correct. * * *

Realizing that Countryman fell far short of showing lack of invention in the patented device, appellee has abandoned it here and substituted Hinckley (a patent covering a temper screw used in drilling wells) as the best prior art showing. Appellee’s argument that Hinckley has all the elements of the patented device and shows lack of invention therein with the requisite clearness emphasizes the complete fallacious hindsight reasoning of appellee and the Trial Court.

In the first place, Hinckley discloses a nonanalogous device

(a) completely and inherently unable to perform the functions of the patented device,

- (b) not intended to perform the functions of the patented device but completely different functions,
- (c) completely different in construction, and
- (d) used in a non-analogous art.

Appellee's own expert witness made this appraisal of the Hinckley patent as prior art (R. 170):

“Q. Would you say that the device of the Hinckley patent had the same mode of operation and produced the same results as the device in the patent in suit?

A. So far as the clutch is concerned, yes.

Q. Just that one part?

A. That is right.”

Clearly, the above evidence is completely insufficient to sustain the burden of proving lack of invention by clear and convincing evidence.

By appellee's own appraisal, the Hinckley patent is the best prior art reference showing lack of invention in the patent in suit. We urge that the Trial Court erred in striking down a patent on a meritorious device on evidence so lacking in sufficiency.

(C) (Page 9, last paragraph, 10, and 11 of appellee's brief).

The argument that the language of the patented claim does not set forth any patentable combination is based upon the same reasoning as the argument that the patented device lacks invention, to-wit: each mechanical element of the patented device can be separately found—some in analogous and some in non-analogous prior devices. We have previously answered this contention herein and have set out the facts and law in our opening brief.

REBUTTAL AS TO ASSERTIONS IN APPELLEE'S BRIEF.

On page 16 of appellee's brief, there is made this statement:

"* * * Neither is there evidence to support such statements in the Brief as 'new conception' (p. 3), 'customers demanded it' (pp. 3, 9), 'an innovation' (p. 5), 'long standing void' (p. 8), 'immediate success' (pp. 8, 10), 'new abilities' (pp. 5, 43)."

As to "new conception", the entire record, including the prior art, discloses that there was no prior scaffolding suitable for the use to which the scaffolding (both appellants' and appellee's) using the patented leg was put. This is manifestly clear from Mr. Johnson's testimony and the lack of any contrary evidence offered by appellee.

As to "customers demanded it", this is based on the testimony of Mr. Meng, the President of appellee, who testified at R. 183 that *government bids specified legs like the patented ones* "so that in order to be able to bid on those requirements for the government *we had to provide that type of leg, otherwise the bid would not be considered*". (Italics ours.)

As to "an innovation" and "long standing void", we believe these to be reasonable inferences from the evidence which showed no prior scaffold for the purpose. The immediate large sales and use of the patented leg type (by appellants and appellee) once the patented device came to market establish that it filled a "long standing void".

As to "immediate success", we believe this also to be clearly evident from the entire record which shows that (a) an invention is made, (b) a new company formed by the in-

ventor not previously in a manufacturing business, and (c) a sales volume of large proportions (R. 101).

As to “new abilities”, we point out the complete lack of any showing of prior art devices having comparable abilities and to the inference which may be drawn from the fact that appellee precisely copied the patented device in order to have a scaffold having abilities comparable to the one using the patented device.

CONCLUSION.

We urge that it is not necessary to produce history-making inventions such as produced by Morse or Bell in order to be awarded the privilege of a valid patent. The record of this Court is replete with instances where meritorious improvement patents were sustained as embodying invention. In this light we call the Court’s attention to a recent decision by Judge Learned Hand in the case of an improvement patent in which the patent was sustained: 106 USPQ 1 (we do not as yet have the Federal Reporter System citation). In that case Judge Hand commented on the effect of the Patent Act of 1952 as follows:

“Therefore we at length come to the question whether Lyon’s contribution, his added step, was enough to support a patent. It certainly would have done so twenty or thirty years ago; indeed it conforms to the accepted standards of that time. The most competent workers in the field had for at least ten years been seeking a hardy, tenacious coating to prevent reflection; there had been a number of attempts, none satisfactory; meanwhile nothing in the

implementary arts had been lacking to put the advance into operation; when it appeared, it supplanted the existing practice and occupied substantially the whole field. We do not see how any combination of evidence could more completely demonstrate that, simple as it was, the change had not been 'obvious * * * to a person having ordinary skill in the art'—§103. On the other hand it must be owned that, had the case come up for decision within twenty, or perhaps, twenty-five, years before the Act of 1952 went into effect on January 1, 1953, it is almost certain that the claims would have been held invalid. The Courts of Appeal have very generally found in the recent opinions of the Supreme Court a disposition to insist upon a stricter test of invention than it used to apply—indefinite it is true, but indubitably stricter than that defined in §104. Indeed, some of the justices themselves have taken the same view. The Act describes itself as a codification of existing law, as it certainly is in the sense that the structure of the system remains unchanged. Moreover those decisions that have passed upon it have uniformly referred to it as a codification, although so far as we have found none of them has held that §103 did not change the standard of invention. And so the question arises whether we should construe §103 as restoring the law to what it was when the Court announced the definition of invention, now expressly embodied in §103, or whether we should assume that no change whatever was intended. To decide that question it seems desirable to look briefly backward.

“From 1793, when the second patent act was passed, until the Act of 1952, the only statutory standard for invention was that the discovery should be ‘new and useful’; and indeed the Act of 1952 itself repeats this

same test in §101. Congress did not try to define it but left it to the courts to develop by precedent. So far as we can find, it was not until 1850 that the Supreme Court made any such attempt; so that, although the disclosure must be 'new,' it was so, provided it had not been published or in public use and was original. However, in *Hotchkiss v. Greenwood*, 11How. 248, the Court imposed an authoritative gloss upon the word, which it put in the following words (p. 267): 'unless more ingenuity and skill in applying the old method' were necessary 'than were possessed by an ordinary mechanic acquainted with the business, there was an absence of that degree of skill and ingenuity which constitute essential elements of every invention. In order (other) words, the improvement is the work of a skillful mechanic, not that of the inventor.' The instruction to the jury, the exception to which the court overruled, had been in substantially the same words, p. 253: if 'no other ingenuity or skill' be 'necessary to construct the knob than that of an ordinary mechanic acquainted with the business, the patent is void.' Thereafter this became the standard rubric and was applied in many cases. The variants were numberless; and 'invention' became perhaps the most baffling concept in the whole catalogue of judicial efforts to provide postulates for indefinitely varying occasions. However, the Court never formally abjured it; not (nor) has it ever substituted any other definite test. Even *Cuno Engineering Corp. v. Automatic Devices Corporation*, 314 U.S. 84, 51 USPQ 272,—which in expression probably was the furthest departure—recognized the continued authority of *Hotchkiss v. Greenwood*, supra: (p. 90, 51 USPQ at 275) 'if an improvement is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art.' Again,

p. 91, 51 USPQ at 275: 'The principle of the Hotchkiss case applies to the adaptation or combination of old or well known devices for new uses.' ''

We urge that in the case at bar the evidence is convincing that more ingenuity was involved in the production of the patented device than the work of a mechanic skilled in the art. Thus the invention of the patent in suit is of the order required by the present standards of patentable invention.

We urge that the District Court erred in concluding the patent in suit to be invalid and should be reversed.

Dated, San Francisco, California,

August 8, 1955.

Respectfully submitted,

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No. 14618

**In the United States Court of Appeals
for the Ninth Circuit**

**JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, APPELLANT**

v.

**BEKINS VAN & STORAGE COMPANY, A CORPORATION,
APPELLEE**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION**

BRIEF FOR APPELLANT

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INDEX

	Page
Statement of jurisdiction.....	1
Statement of the case.....	2
Specification of errors.....	9
Summary of argument.....	9
Argument:	
Appellee's Alameda warehouse is a separate "establishment"	
which is not a "retail" one within the meaning of Section 13	
(a) (2) of the Fair Labor Standards Act.....	11
Conclusion.....	25
Appendix.....	26

CITATIONS

Cases:

<i>Armstrong Co. v. Walling</i> , 161 F. 2d 515.....	13, 14, 22
<i>Burhans v. Montgomery Ward & Co.</i> , 110 F. Supp. 184....	10, 11, 19, 20
<i>Consolidated Timber Co. v. Womack</i> , 132 F. 2d 101.....	10, 17, 21
<i>Fletcher v. Grinnell Bros.</i> , 150 F. 2d 337.....	13
<i>Fred Wolferman, Inc. v. Gustafson</i> , 169 F. 2d 759.....	13, 14, 22
<i>McComb v. Casa Baldrich, Inc.</i> , 80 F. Supp. 869.....	13, 14, 22
<i>McComb v. W. E. Wright Co.</i> , 168 F. 2d 40, certiorari denied, 335 U. S. 854.....	13, 14, 22
<i>McComb v. Wyandotte Furniture Co.</i> , 169 F. 2d 766.....	13
<i>Mitchell v. E. G. Shinner & Co.</i> , 12 WH Cases 452.....	13
<i>Montgomery Ward & Co. v. Antis</i> , 158 F. 2d 948, certiorari denied, 331 U. S. 811.....	13
<i>Phillips Co. v. Walling</i> , 324 U. S. 490.....	9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25
<i>Walling v. American Stores Co.</i> , 133 F. 2d 840.....	13
<i>Walling v. Goldblatt Bros.</i> , 152 F. 2d 475, certiorari denied, 328 U. S. 854.....	13, 14
<i>Walling v. A. H. Phillips</i> , 50 F. Supp. 749.....	12, 13

Statutes:

Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U. S. C. 201 <i>et seq</i> :	
Sec. 13 (a) (2).....	2, 4, 8, 9, 10, 11, 16, 17, 19, 23, 24
Sec. 15 (a) (2).....	1
Sec. 15 (a) (5).....	1
Sec. 17.....	1
Fair Labor Standards Amendments of 1949, Sec. 16 (c).....	22

Miscellaneous:

Alexander, Surface and Alderson, <i>Marketing</i> , Ginn and Co., Boston (3d ed. 1953) pp. 162-165.....	19
Converse and Jones, <i>Introduction to Marketing</i> , Prentice-Hall, New York (1948), p. 209.....	19

Miscellaneous—Continued

Page

Interpretative Bulletin No. 6, par. 18 (1940 Wage-Hour Manual, p. 154).....	22
Phillips and Duncan, <i>Marketing: Principles and Methods</i> , Richard D. Irwin, Inc., Chicago (Rev. ed., 1952) pp. 160-161.....	19
29 CFR 1954 Supp. 514.1 (e).....	15
29 CFR 541.1.....	5
29 CFR 1954 Supp., 779.3 (b).....	23
95 Cong. Rec. 12505.....	24
95 Cong. Rec. 12579.....	24
95 Cong. Rec. 14877.....	23
95 Cong. Rec. 14932.....	24
28 U. S. C.:	
Sec. 1291.....	2
Sec. 1294 (1).....	2
Sec. 1337.....	2
Sec. 1345.....	2
29 U. S. C., Sec. 217.....	2

In the United States Court of Appeals for the Ninth Circuit

No. 14618

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, APPELLANT

v.

BEKINS VAN & STORAGE COMPANY, A CORPORATION,
APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLANT

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the United States District Court for the Southern District of California, Central Division, dismissing an action by the Secretary of Labor, filed under Section 17 of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by c. 736, 63 Stat. 910, 29 U. S. C. 201, *et seq.* to restrain appellee from violating Sections 15 (a) (2) and 15 (a) (5) of the Act.¹ After a full hearing, the court made "Findings of Fact and Conclusions of Law" (R. 33-49) and en-

¹ The pertinent statutory provisions are printed in full in the Appendix, *infra*, p. 26.

tered final judgment on October 18, 1954 (R. 51). Notice of appeal to this Court was filed on December 15, 1954 (R. 51-52).

The district court had jurisdiction to entertain the action under 29 U. S. C. Section 217, as well as under 28 U. S. C. Sections 1337 and 1345. This Court has jurisdiction to determine the appeal under 28 U. S. C. Sections 1291 and 1294 (1).

STATEMENT OF THE CASE

The complaint (R. 3-6) alleges violations of the Act's overtime and record-keeping provisions with respect to employees employed in appellee's Alameda warehouse, located at 825 East Fourth Street (Fourth and Alameda Streets) in the City of Los Angeles, California. The Alameda warehouse and four other warehouses, located at different places in the City of Los Angeles, comprise what is known as appellee's East Los Angeles Division. The sole question raised by this appeal is whether, for purposes of the "retail or service establishment" exemption provided in section 13 (a) (2) of the Fair Labor Standards Act, the Alameda warehouse constitutes a single establishment or whether, as the trial court held, appellee's whole East Los Angeles Division, consisting of five separate warehouses and a central office, constitutes a single establishment (R. 19).

There is no dispute as to the essential evidentiary facts. Appellee is engaged in the van and storage business, handling both household and commercial goods (R. 10). The largest storage company in the

country,² appellee advertises itself as having "offices or agents in all principal cities" (R. 76a). In California, it owns and operates 36 warehouses, at each of which employees are regularly engaged in handling, packing and storing goods substantial quantities of which have been, and are being, received from out-of-State points and have been, and are being, handled, packed, shipped, delivered, transported and offered for transportation to out-of-State points (Fdg. 5, R. 35). These warehouses, located in various parts of the State, are grouped into 19 divisions or districts (R. 11, 36), each with a main office patterned after appellee's general office (R. 36, 61-62). The offices for the various divisions perform all management, executive and administrative functions for the warehouses within their jurisdiction (R. 42-43) and are responsible to appellee's general office or top management for the successful operation of such warehouses (R. 69).

As stated above, appellee's East Los Angeles Division consists of five warehouses. These warehouses are all in the central part of the City of Los Angeles, but at different locations. The main office and one warehouse of this division is at 1335 Figueroa Street, hereinafter called "Figueroa." The four other warehouses, known respectively as "Grand Avenue," "Crenshaw," "Wilshire" and "Alameda," are located at 3625 South Grand Avenue, 4174 West Pico Street, 116-122 South Western Avenue, and Fourth and Alameda Streets. Alameda is approximately

² Appellee so described itself in its trial court brief.

1 $\frac{3}{4}$ miles from Figueroa, and the others are from 1.8 to 3.5 miles from Figueroa (Fdg. 10, R. 37-38; Stip. R. 11).³

Each of the warehouses in the East Los Angeles Division contains warehouse space, loading docks, packing equipment and yard area for the servicing and operation of motor vans and trucks (R. 38).⁴ Two of them—Alameda and Grand Avenue—are equipped with a railroad siding (*id.*). Alameda, the one in issue here, is a five-story, reinforced concrete building, containing approximately 60,000 square feet of space. It is located in the heart of the industrial area of Los Angeles on a spur track of the Southern Pacific Railroad. Like all of appellee's other warehouses, it has truck and van loading docks, and, in addition, railroad loading docks and five storage areas (R. 12, 38, 129). Also, like appellee's other warehouses, Alameda handles, packs, moves and stores household goods (R. 12). However, Alameda does considerably more commercial warehousing than do the others (R. 75-76). In fact, this phase of its business is so great in volume that Alameda, standing alone, cannot meet the percentage tests for exemption under Section 13 (a) (2) of the Act (R. 18, 34).

Though there is some interchange of employees between the various warehouses in the East Los Angeles Division, Alameda has approximately 11 regular em-

³ See Government Ex. 2 (transmitted to this Court in its original form) which is a map of the City of Los Angeles showing the location of each of these warehouses.

⁴ See Government Ex. 1 (transmitted to this Court in its original form) which is a group of photographs of the warehouses in the East Los Angeles Division.

ployees of its own, including its own warehouse foreman (Fdg. 12, R. 39; Stip. R. 13-14), who is admittedly an executive employee within the exemption as defined by applicable regulations, 29 C. F. R. 514.1 (Fdg. 12, R. 39; Stip. R. 17). He supervises the other warehouse employees, opens and closes the building, is responsible for fire prevention measures, supervises and works on loading and unloading of freight cars, reports incompetent work to supervisors, selects locations in the warehouse for storing goods, and performs minor clerical work in connection with the receipt and delivery of stored goods (Fdg. 13, R. 40; Stip. R. 13-14).

Two of Alameda's 11 regular employees are office workers whose duties consist of preparing documents used in connection with the receipt and delivery of storage lots, preparing warehouse receipts, maintaining stock cards on commercial storage, answering telephones and carrying on other clerical work (Fdg. 13, R. 39; Stip. R. 13). Of the remaining eight employees, two are working foremen and six are warehousemen whose duties consist of loading and unloading freight cars and trucks, crating and packing goods, and driving and helping on moving jobs (Stip. R. 17).

Alameda is thus equipped to, and does, perform practically all of the physical operations involved in running a storage warehouse. As stated above, central management for it and the other warehouses in the East Los Angeles Division is furnished by the division's main office. This office also purchases the supplies which the warehouses use. These supplies are

bought in large lots and stored in one or another warehouse until needed. In addition, the division office operates a shop where the automotive equipment used by the warehouses is repaired. This shop is located at Figueroa, which houses both the division office and appellee's general office (Fdg. 25, R. 45-46).

The East Los Angeles Division office is composed of a manager, an assistant manager, a superintendent, an accountant, a dispatcher, a sales manager, and a storage manager (Fdg. 17, R. 42-43). Being central office employees, these individuals perform duties in their respective fields for all five warehouses, except that the foreman at each warehouse is generally responsible for storage operations (Fdg. 13, R. 40). Thus, in addition to the functions stated above, the Division office people keep the payrolls (Fdg. 24, R. 45), handle all the accounting work (Fdgs. 22, 23, 24, R. 44-45), do the banking (Fdg. 24, R. 45), and carry on an active sales program (Fdg. 19, R. 43). The records, including payrolls and financial statements, are kept for the warehouses as a group and not broken down or classified in any manner for particular ones (Fdg. 23, R. 45). According to appellee's assistant controller, the records are kept in this manner because "it would take more accounting personnel and it would be prohibitive cost-wise" (R. 87) to keep separate records for each warehouse.

During the trial appellee offered a great deal of evidence concerning its policies and historical background. This evidence shows that ever since the company was founded in 1895 (at which time operations were conducted in a single rented building (R.

126)), it has endeavored to keep up with the constantly growing population of California by building or acquiring new warehouses in or near residential areas as they developed (R. 35-36, 60-61).

Alameda, the first company-owned Bekins warehouse and the one in issue here, was built in 1898 to serve the prosperous residential area of Los Angeles which was then around Fourth and Alameda Streets (R. 40, 126). By 1907, however, the nice residential area of the city had started to "move out South Figueroa Street and west from there" (R. 127). The company thereupon acquired the property on which Figueroa is now located. When that warehouse was built, it was in "the leading residence area in Los Angeles" (R. 40-41). This is not true today, and Figueroa, like Alameda, no longer has the demand for the storage of household goods that it once did (R. 130). According to Mr. Elliott, who is a member of appellee's board of directors, vice-president and also manager of the East Los Angeles Division (R. 111), Figueroa is being advertised and pushed as an "office record center so that the various companies in the downtown area and adjacent area to Figueroa Street can store their dead office files and records" (R. 130). Also, space in it is rented to "customers who need blocks of five thousand foot space" (*id.*).

Crenshaw was built in 1928 or 1929, and "there again it was to follow the residential development of the city" (R. 127). Wilshire was acquired by purchase in 1931 to serve the then "prosperous Wilshire residence area" (R. 41). Now, however, substantial

portions of these two warehouses are leased to a furniture dealer for the sale of furniture (R. 42). Grand Avenue, the fifth warehouse in the East Los Angeles Division, was acquired in 1942 "to meet unusual requirements for space for storage of household goods resulting from World War II" (R. 41).

All of appellee's operating employees, including those at Alameda, are members of the International Brotherhood of Teamsters Union (R. 47). Their collective bargaining agreement does not provide for the payment of overtime compensation for weekly hours between 40 and 48 (*id.*) and appellee has paid for such hours at straight time rates only (R. 17). With respect to its wage and hour records, appellee has failed to show the "hours worked in each week or wages paid on a weekly basis" (R. 18).

On the basis of this record, the trial court held that appellee's whole East Los Angeles Division, consisting of Alameda, four other warehouses and a central office, constitutes a single establishment within the meaning of the exemption contained in Section 13 (a) (2) of the Fair Labor Standards Act. In reaching this conclusion, the trial court theorized that even though appellee had successfully adjusted its business in the East Los Angeles Division to meet changing conditions, it "could carry on the operations there as well or better if all of its business were carried on in a single large building instead of five buildings geographically separated" (R. 42). Judgment, therefore, was entered for appellee and the complaint dismissed (R. 50, 51).

SPECIFICATION OF ERRORS

1. The trial court erred in making the findings, embodied in Findings of Fact Nos. 2 and 3, that appellee's whole East Los Angeles Division is a single "retail or service establishment" within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act, and that all of the employees of that division, including those employed at the Alameda warehouse, are thus exempted from the Act.

2. The trial court erred in making Finding of Fact No. 16 and Conclusions of Law Nos. 1, 2 and 3.

3. The trial court erred in failing to hold that appellee's Alameda warehouse is an "establishment" for purposes of the "retail or service establishment" exemption provided in Section 13 (a) (2) of the Fair Labor Standards Act.

4. The trial court erred in dismissing the complaint and in failing to grant the injunction prayed for in the complaint.

SUMMARY OF ARGUMENT

The holding of the court below that Bekins' Alameda warehouse is not an "establishment" but part of an "establishment" exempt from the Act, is clearly erroneous on both the law and the facts. It is plainly in conflict with the controlling decision of the Supreme Court in *Phillips v. Walling*, 324 U. S. 490, 496, holding an "establishment" to mean a "distinct physical place of business," and with the decisions of other Courts of Appeals.

The only distinction that might be drawn between the instant case and *Phillips* is that in *Phillips* the

chain consisted of grocery stores whereas here it is van and storage warehouses, but this is immaterial, for the *Phillips* principle is applicable to any multi-unit enterprise.

The facts show conclusively that Alameda is a "distinct physical place of business." Its physical location and attributes, the functions of its employees and the nature of its operations compel this conclusion.

The trial court, however, ignored *Phillips* and applied what it called a "rule of reasonableness" which is clearly without precedent and in direct conflict with the rule of narrow construction applicable to exemptions from the Act. Applying its "rule of reasonableness" led the court to hold that the central office employees are within the 13 (a) (2) exemption and that appellee's organizational structure was determinative of the exemption issue. Since the Supreme Court's decision in *Phillips*, it has been settled that central office employees of chain systems are not within the exemption and that organizational structure is irrelevant in determining what is an "establishment."

Apparently the court below accepted the rationale of *Burhans v. Montgomery Ward & Co.*, 110 F. Supp. 184 (S. D., N. Y., 1952) for it theorized that appellee's East Los Angeles Division "could carry on the operations there as well or better if all of its business were carried on in a single large building." (Fdg. 16, R. 42). Such theorizing has been expressly rejected by this Court in *Consolidated Timber Co. v. Womack*, 132 F. 2d 101, 107. Moreover, the rationale of the

Burhans decision is in no wise applicable here for the facts are completely different. In fact, the trial court's own findings (Fdg. 15, R. 40-41) and its oral opinion (R. 140) clearly contradict the appropriateness of *Burhans* and the theoretical finding in Finding No. 16.

The *Phillips* doctrine is not limited, as appellee contends, to enterprises that operate chains of retail stores. It has been applied to a variety of chain-system organizations. This has been the consistent administrative position and it has been approved by both the Supreme Court and the Congress. The legislative history of the 1949 Amendments to Section 13 (a) (2) shows that Congress explicitly approved the *Phillips* doctrine and that it intended no change in the Supreme Court's definition of "establishment."

ARGUMENT

Appellee's Alameda Warehouse is a separate "establishment" which is not a "retail" one within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act

Section 13 (a) (2) of the Act, the exemption here involved, reads as follows:

The provisions of sections 6 and 7 shall not apply with respect to * * * any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized

as retail sales or services in the particular industry.

Concededly, appellee's Alameda warehouse does not meet the percentage tests prescribed by this section for exemption. The lower court, however, regarded this as immaterial, because, in its view, Alameda is not an "establishment" but part of an "establishment," that "establishment" being appellee's whole East Los Angeles Division. This view, we submit, is contrary to the controlling decision of the Supreme Court in *Phillips Co. v. Walling*, 324 U. S. 490 (which was expressly approved by Congress when the Act was undergoing amendment in 1949), and to the numerous decisions of the United States Courts of Appeals in which the doctrine of the *Phillips* case has been applied.

In the *Phillips* case, the "retail establishment" exemption was claimed by a chain enterprise consisting of 49 grocery stores and a separate warehouse and central office which serviced the stores. It was there contended that the stores, warehouse and central office together constituted a single "establishment" for purposes of the exemption. The Supreme Court made short shrift of this contention, stating that the word "establishment" as used in the exemption does not mean an entire business or enterprise but rather "a distinct physical place of business." 324 U. S. at 496. Therefore, although the 49 stores were supervised by the central office which also prepared their payrolls, kept their inventories, ordered their goods, collected their daily cash receipts and deposited the receipts in a single bank account (see *Walling v.*

A. H. Phillips, 50 F. Supp. 749 at 751), they were held to be separate “establishments,” distinct and apart from each other and from the central office. 324 U. S. at 496.

Similarly, in the instant case, although Alameda is supervised and serviced in many ways by the main office of appellee’s East Los Angeles Division, it is nevertheless a separate and distinct “establishment,” as is also true of each of the four other warehouses centrally managed by the East Los Angeles Division office. Under the *Phillips* case, each separate unit of a multi-unit organization is an “establishment” for purposes of the exemption. *McComb v. W. E. Wright Co.*, 168 F. 2d 40, 42–43 (C. A. 6), certiorari denied, 335 U. S. 854; *Fletcher v. Grinnell Bros.*, 150 F. 2d 337 at 339 (C. A. 6); *Montgomery Ward & Co. v. Antis*, 158 F. 2d 948 (C. A. 6), certiorari denied, 331 U. S. 811; *McComb v. Wyandotte Furniture Co.*, 169 F. 2d 766, at 769–770 (C. A. 8); *Walling v. Goldblatt Bros.*, 152 F. 2d 475, 477–478 (C. A. 7), certiorari denied, 328 U. S. 854; *Mitchell v. E. G. Shinner & Co.*, 12 WH Cases 452 (C. A. 7), not yet officially reported; *Armstrong Co. v. Walling*, 161 F. 2d 515, 516–517 (C. A. 1); *Fred Wolferman, Inc. v. Gustafson*, 169 F. 2d 759 (C. A. 8); *McComb v. Casa Baldrich, Inc.*, 80 F. Supp. 869 (D. Puerto Rico, 1948). See also *Walling v. American Stores Co.*, 133 F. 2d 840 (C. A. 3), decided prior to *Phillips*.

The above decisions make it clear that the *Phillips* doctrine is not limited to the typical chain-store situation, but applies with equal force to any multi-unit enterprise. Thus, in *McComb v. W. E. Wright Co.*,

supra, the doctrine was applied to a coal and building supply organization, consisting of a general office, a warehouse, several yards, a garage to service its trucks, and several retail stores, even though the court found that the “integration of facilities [was] not the conventional chain-store organization where a single warehouse serves multiple retail stores” (168 F. 2d at 42–43). There was, said the Sixth Circuit, “no escape from the application of the *Phillips* decision” (*id.*, at 43). And, in agreeing with the trial court’s treatment of the company’s outlets, the Sixth Circuit said that “of course, [it had been] right when it considered each * * * as a separate establishment” (*id.*, at 43).

The above decisions also make it clear that the principle of the *Phillips* decision is applicable even in the absence of geographical separateness. If units of a multi-unit organization are distinct from each other, they are separate “establishments” for purposes of the “retail establishment” exemption, even though located in the same building. See *Goldblatt, Armstrong, Wright, Gustafson, and Casa Baldrich, supra*.

Plainly, then, the *Phillips* doctrine applies here where there is clear geographical separation between the 36 van and storage warehouses owned and operated by appellee.⁵ As to Alameda, this warehouse is

⁵ Even the five warehouses comprising appellee’s East Los Angeles Division are several miles apart. Thus, the parties stipulated that these warehouses are physically separated from Figueroa, the location of the Division office, by distances from $1\frac{3}{4}$ miles to 3.5 miles; and it seems fair to say that the distance between Alameda and several of the warehouses in the Division exceeds 3.5 miles. See Govt. Ex. No. 2.

not only distinct from all the others, but it is equipped and staffed to function as a distinct place of business and does in fact so function. Thus, Alameda's five-story building, containing approximately 60,000 square feet of space, is large enough to accommodate large lots of bulky commercial goods. This building, moreover, is located on a railroad siding, and Alameda is equipped with loading docks which enable it to load and unload freight cars which are regularly received from and dispatched to all parts of the United States. Alameda is also equipped with separate docks for the loading and unloading of moving vans and trucks. These facilities, combined with Alameda's location in the heart of the industrial area of Los Angeles from which it derives most of its business, attest to the fact that Alameda is a separately functioning unit.

In addition to its physical attributes, Alameda has 11 regular employees of its own. One of these is a foreman, exempt as an executive employee,⁶ who supervises the storage operations and the other employees. His supervisory duties begin when goods are

⁶ To be exempt as an "executive", an employee must meet certain tests, one of which is that he devote not more than 20 percent of his time to work of a non-executive type. See 29 CFR 1954 Supp. 541.1, subsection (e). An exception from this test, however, is made in the case of "an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed, *ibid.*" Though this is not spelled out in the record, it would appear that Alameda's foreman comes within the exception as being "an employee in *sole charge of an independent establishment or a physically separated branch establishment.*" [Emphasis added.]

received and continue until they are dispatched. Apparently, this employee is also charged with the safe-keeping of goods since he is the one responsible for fire prevention measures at Alameda and for opening and closing the building. There is thus present at Alameda responsible management to perform all the "on-the-spot" managerial functions necessary to its storage operations.

Alameda's employees also include two office workers who prepare warehouse receipts and other documents used in connection with the receipt and delivery of storage lots, accept and prepare orders for customers, maintain stock cards on commercial goods, and figure storage rates. In the preparation of warehouse receipts, they perform a vital function incident to the warehousing business. The remaining employees perform all the other skilled and unskilled tasks involved in warehousing, such as loading and unloading freight cars and trucks, crating and packing goods, driving trucks, and helping on moving jobs.

It is thus clear that Alameda is "a distinct physical place of business" and, therefore, an "establishment" for purposes of the Section 13 (a) (2) exemption.

In holding that Alameda is not a "distinct physical place of business," the trial court did not even mention, much less attempt to distinguish, the *Phillips* case, but applied instead what it called a "rule of reasonableness." "If," said the trial court, "the set-up as made by the enterprise of its management, business, and accounting functions, viewed in a reasonable light, constitutes one establishment, then the law should so hold." (R. 143.) But we are here dealing

with an exemption from the Act—the very one, in fact, with respect to which the Supreme Court, in the *Phillips* case, emphasized the narrow construction rule, which this Court had earlier recognized in *Consolidated Timber Co. v. Womack*, 132 F. 2d 101 (C. A. 9). As this Court said in the *Womack* case: “It is elementary, of course, that the Act is remedial and that persons claiming to come within exemptions therein must bring themselves within both the letter and the spirit of the exemptions, which are subject to a strict construction.” (132 F. 2d at 106.)

That the trial court’s “rule of reasonableness” has no place in interpreting exemptions is pointed up by the results which it reached in this case. If anything is well settled under the Act it is that central office employees of chain systems are not within the Section 13 (a) (2) exemption. The holding below, however, not only exempts the employees at Alameda, even though the business there performed is not “retail” in nature, but it also exempts the employees employed at the central office which services Alameda and the other warehouses comprising the East Los Angeles Division.⁷ And in time the holding would extend the “retail establishment” exemption still further to include the employees at the Figueroa warehouse establishment which is fast becoming a record storage center.

In applying its “rule of reasonableness,” the trial court was persuaded by the testimony offered by appellee to show that its East Los Angeles Division

⁷ At the present time, however, no compliance problem is indicated with respect to the central office employees.

Office keeps records, including the payrolls and financial statements, for the warehouses in the Division as a whole, purchases all supplies for the warehouses, maintains a single shop for the repair of all trucks, and employs a single sales force to secure business for the various warehouses. But the fact that appellee has found it efficient and economical to organize its enterprise into divisions so that most of the administrative, sales and executive functions are centralized in a single office for a designated group of warehouses, is irrelevant and immaterial in determining whether any one of the warehouses is an "establishment." Centralization of executive, administrative, accounting, personnel management, purchasing, sales and advertising functions is one of the principal features of the chain system of operation.⁸ Such centralization, moreover was present in *Phillips*, but nowhere in the decision did the Supreme Court intimate that organizational structure should be taken into account,

⁸ Authorities in the field of marketing agree that centralization of management and common functions is the principal characteristic of a chain organization. The following quotation is typical of their view :

"The structure of the chain system is usually based upon the theory that common functions should be performed, with very minor exceptions, in the central headquarters and that the central office should exercise a large measure of control over the activities of the local units. The chain store system is therefore generally made up of three elements: a central office or headquarters, a group of retail outlets, and a liaison organization functioning between the two. * * *

"(1) Buying. Most chain systems do the bulk of their buying centrally. * * *

* * * * *

"(3) Advertising. Most chain systems use some form of advertising as a selling device. * * * The preparation of the mate-

let alone be held controlling, or that a "rule of reasonableness" should be applied in determining what constitutes an "establishment." On the contrary, the Court specifically rejected the contention that the *Phillips* enterprise, organizationally similar to appellee's East Los Angeles Division, was a single establishment. Implicit in the decision, and those following it, is the holding that the organizational structure of a multi-unit enterprise has no bearing on the question whether its units are separate "establishments" under Section 13 (a) (2) of the Act.

In the court below, appellee relied on *Burhans v. Montgomery Ward & Co.*, 110 F. Supp. 184 (S. D., N. Y., 1952), which was decided on the basis of a factual situation completely different from that involved here. The "establishment" issue there arose in connection with a single warehouse serving a single retail store. The store, located in Menands, New York, a suburb of Albany, had outgrown the physical

rial and the purchase of space are usually handled by the central management. * * *

* * * * *

"(5) Records and Reports. The accounting work of a chain system is usually carried or very closely supervised by its central headquarters. The accounts constitute one of the chief devices through which control of the various units can be exercised.

* * *

"(6) Personnel. Although many of the small chain organizations maintain no formal personnel department, most of the sectional and national systems include such divisions in their central or district headquarters establishment. * * *" Alexander, Surface and Alderson, *Marketing*, Ginn and Co., Boston (3d ed. 1953), pp. 162-165; see also Phillips and Duncan, *Marketing: Principles and Methods*, Richard D. Irwin, Inc., Chicago (Rev. ed., 1952), pp. 160-161; Converse and Jones, *Introduction to Marketing*, Prentice-Hall, New York (1948), p. 209.

capacity of its building and was unable to obtain sufficient space in a contiguous building. It, therefore, acquired a warehouse, located about a mile away. The newly acquired warehouse was to, and did, serve only the one store. The court held that it was a part of the retail store and, therefore, not within the *Phillips* rule. In so holding, the court rested its decision on its findings that the warehouse was "to supplement and complete the functions of the retail store," and that it "in effect operated as a part of the retail store." 110 F. Supp. at 196.

Obviously, the rationale of the *Burhans* case does not apply here where there are five warehouses, each of which is a distinct place of business, and no one of which is functionally an adjunct to a single retail outlet.

Apparently, however, the trial court accepted the rationale of the *Burhans* decision because it theorized that appellee's East Los Angeles Division "could carry on the operations there as well or better if all of its business were carried on in a single large building instead of five buildings geographically separated" (Fdg. 16, R. 42). This "finding" is based on the completely erroneous premise that the business of appellee's original warehouse (Alameda) outgrew the structure, and that the other warehouses were acquired to take care of the overflow. The record conclusively shows that the four warehouses which, together with Alameda, comprise the East Los Angeles Division, were acquired pursuant to appellee's policy of keeping up with the development of new and prosperous residential areas. Thus, in Finding

No. 15 (R. 40-41), the trial court carefully recounted the historical development of appellee's East Los Angeles Division and found that when Alameda was built in 1898 it "was in the center of a prosperous residence area"; that when Figueroa was built, between 1907 and 1913, it "was adjacent to the leading residence area * * * then along South Figueroa Street"; that when Crenshaw was built in 1927, it was "to serve the new residence areas in its area, particularly the Leimert Park Area"; that when Wilshire was acquired in 1931, it "served the prosperous Wilshire residence area"; and that when the Grand Avenue warehouse was acquired in 1942, it was "to meet unusual requirements for space for storage of household goods resulting from World War II."

And in its oral opinion, the trial court expressly recognized that it was the expansion of Los Angeles to the south and to the west which led to the construction or acquisition of the additional warehouses (R. 140). Its speculation, therefore, that the business of appellee's East Los Angeles Division could be carried on as well or better in a single large building is thus completely refuted by its own findings as to why the various warehouses now comprising the Division were acquired. But quite apart from this, this Court has expressly held that in cases under this Act, "it is not what could have been the fact, but what actually was the fact, upon which the decision must rest." *Consolidated Timber Co. v. Womack*, 132 F. 2d at 107 (C. A. 9).

In the court below, appellee contended that the *Phillips* doctrine applies only to organizations which

operate a chain of stores and not to those which operate a chain of van and storage warehouses. Plainly, the *Phillips* doctrine cannot be so limited. Indeed, as we have shown, the courts have refused to limit it to the typical retail chain-store situation, but have applied it in cases involving various types of multi-unit enterprises—a building and supply company (*McComb v. W. E. Wright Co., supra*); a commissary company operating refreshment stands in railroad stations (*Armstrong Co. v. Walling, supra*); a candy kitchen located in the same building as the selling outlet which it served (*Fred Wolferman, Inc. v. Gustafson, supra*); and a printing plant adjacent to a stationery store (*McComb v. Casa Baldrich, Inc., supra*).

Also, it has been the consistent administrative position that the term “establishment” means a “physically separate unit” of *any* multi-unit company. This position was outstanding when the Supreme Court decided *Phillips* and approved the interpretative bulletin which then contained it.⁹ It was also outstanding when the Act was amended in 1949 and Congress approved the *Phillips* doctrine and, in addition, provided in Section 16 (c) of the Fair Labor Standards Amendments of 1949 (c. 736, 63 Stat. 910, 916 (c))

⁹ See old Interpretative Bulletin No. 6, paragraph 18 (1940 Wage-Hour Manual, p. 154, at 157): “The question has been raised as to the scope of the term ‘establishment’ in the case of chain-store systems, branch stores, groups of independent retailers organized to carry on business in a manner similar to chain-store systems, and retail or service outlets of large manufacturing or distributing concerns. In the ordinary case, each physically separated unit or branch store will be considered a separate ‘establishment’ within the meaning of the exemption.”

that all administrative interpretations in effect at the time and not inconsistent with the Amendments "shall remain in effect."¹⁰

As stated above, the *Phillips* doctrine was expressly approved by Congress when the Act was undergoing amendment in 1949. While, as *Phillips* points out, the legislative history of the original "retail establishment" exemption made it clear enough that the exemption was not intended to apply to an entire business or enterprise (see 324 U. S. at 496-497), any possible doubt about this was completely dispelled by the 1949 amendments. Thus, in its consideration of the amendments, Congress specifically approved the Supreme Court's interpretation in the *Phillips* case of "establishment," the key term of the exemption. See the Statement of a Majority of the Senate Conferees that the *Phillips* definition of "establishment" as "a physically separate place of business" was to be retained (95 Cong. Rec. 14877):

¹⁰ The position, now found in 29 CFR 1954 Supp., 779.3 (b) is expressed as follows: "The term 'establishment' as used in section 13 (a) (2) * * * means a distinct physical place of business. The term is not synonymous with the words 'business' or 'enterprise' as applied to multi-unit companies. Such business organizations operate a number of establishments, some of which may qualify for exemption and some of which may not. * * * Each physically separate place of business must be considered as a separate establishment. Thus, in the case of chain-store systems, branch stores, groups of independent stores organized to carry on business in a manner similar to chain-store systems, and retail outlets operated by manufacturing or distributing concerns, each physically separated unit or branch store will, in the ordinary case, be considered a separate establishment within the meaning of the exemptions."

* * * Under the present law (*Phillips v. Walling* (324 U. S. 490)) a retail establishment means a physically separate place of business which possesses the characteristics of a retailer and does not mean an entire business enterprise. The conference agreement in no way changes the meaning of the term "establishment."

The Statement of the House Managers reemphasized this point (95 Cong. Rec. 14932):

Paragraph (2) of Section 13 (a) of the conference agreement does not exempt large mail-order houses which make most of their sales to out-of-State customers. Nor does it exempt warehouses and central offices of chain-store systems. The employees in such warehouses and central offices are not employed "by" any single retail or service establishment in the chain but rather by the chain itself.

And Senator George, one of the sponsors of the amendment to Section 13 (a) (2), made the same point (95 Cong. Rec. 12579):

* * * I wish to say that the word "establishment" has been very well defined in the Wage and Hour Act. It means now a single physically separate place of business which possesses the characteristics of a retailer and it does not mean an entire business enterprise.

Similarly, Senator Holland, also one of the main sponsors of the amendment, specifically explained that "there is no intent in the proposed amendment to change" * * * "the holding of the United States Supreme Court in *Phillips v. Walling* (324 U. S. 490)" (95 Cong. Rec. 12505).

CONCLUSION

It is overwhelmingly clear that *Phillips* is controlling on the issue of law in this case. The cases decided thereunder, the legislative history of the 1949 Amendments to the Act, and the consistent administrative interpretation all compel this conclusion. The decision below is incorrect on both the facts and the law. Accordingly, the judgment should be reversed.

Respectfully submitted.

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MAY 1955.

A P P E N D I X

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fair Labor Standards Act, Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201 *et seq.*, as amended by the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 29 U. S. C. Supp. V 201 *et seq.*, are as follows:

SEC. 13 (a). The [minimum wage and overtime] provisions * * * shall not apply with respect to * * *

(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

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SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

Extract from the Fair Labor Standards Amendments of 1949 (c. 736, 63 Stat. 910, 29 U. S. C. sec. 201):

SEC. 16. (c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation or agreement of the Administrator or the Secretary as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.



No. 14,618

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES P. MITCHELL, Secretary of Labor, United States
Department of Labor,

Appellant,

vs.

BEKINS VAN & STORAGE COMPANY, a corporation,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

REPLY BRIEF IN SUPPORT OF APPELLEE'S POSITION.

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TOPICAL INDEX

	PAGE
Statement of facts.....	1
Statement of legal issue.....	9
Summary of argument.....	10
Argument	12

I.

The separate physical location of a building comprising only a part of an operating business unit, does not constitute it as a separate "establishment" under Section 13(a)(2). Business organization and practice are controlling considerations	12
A. The facts establish that Alameda had no identity except as a physical location; its integration with the Division is complete.....	12
B. Section 13(a)(2), as amended.....	18
C. The legislative history of Section 13(a)(2).....	19
D. Appellant itself, in other cases, has taken the position first, that geographical considerations are not controlling, and second, that business usage and practice must be considered	22
E. Appellants cannot base a distinction between Alameda and the East Los Angeles Division upon the fact that the former may store more commercial goods than the other warehouses making up the Division.....	24

II.

Appellant relies principally upon the case of Phillips v. Walling (1945), 324 U. S. 490, 89 L. Ed. 1095. To the extent that it is applicable, this case supports appellee's, not appellant's position	27
A. The 1949 amendments enacted after the Phillips decision confirm its support of appellee's position.....	35
B. The policy and purposes of the Act must be considered in its application.....	36
C. The practical business consequences of the interpretation of the Act is a consideration in determining its meaning	40

III.

Decisions since the Phillips case also confirm the correctness of appellee's position.....	43
A. The cases relied upon by appellant do not support its position	49

IV.

The interpretation of the term "establishment" under the various unemployment compensation statutes supports the position of appellee.....	52
--	----

TABLE OF AUTHORITIES CITED

CASES	PAGE
Armstrong Co. v. Walling, 161 F. 2d 515.....	50
Bogash v. Baltimore Cigarette Service, 193 F. 2d 291.....	46, 47
Burhans v. Montgomery Ward & Co., 110 Fed. Supp. 184.....	
.....	41, 43, 44, 45
Chrysler Corp. v. Smith, 297 Mich. 438, 298 N. W. 87.....	53, 57
Duncan v. Montgomery Ward & Co., 42 Fed. Supp. 879.....	47, 48
Fletcher v. Grinnell Bros., 150 F. 2d 337.....	50
Ford Motor Co. v. Kentucky Unemployment Compensation Commission, 243 S. W. 2d 657.....	55, 56, 57
Fred Wolferman, Inc. v. Gustafson, 169 F. 2d 759.....	51
General Motors Corporation v. Mulquin, 134 Conn. 118, 55 A. 2d 732	58, 59
McComb v. Casa Baldrich, Inc., 80 Fed. Supp. 869.....	50
McComb v. W. E. Wright Co., 168 F. 2d 40; cert. den., 335 U. S. 854, 93 L. Ed. 402.....	50
McComb v. Wyandotte Furniture Co., 169 F. 2d 766.....	50
Mitchell v. E. G. Shriner & Co., 12 WH Cases 453.....	51
Montgomery Ward & Co. v. Antis, 158 F. 2d 948; cert. den., 331 U. S. 811, 91 L. Ed. 1831.....	47
Mountain States Tel. & Tel. Co. v. Sakrison, 71 Ariz. 219, 225 P. 2d 707.....	54
Nordling v. Ford Motor Co., 231 Minn. 68, 42 N. W. 2d 576....	
.....	56, 57
Phillips v. Walling, 324 U. S. 490, 89 L. Ed. 1095.....	
.....	11, 24, 27, 28, 29, 30, 31, 33, 34, 35, 36 40, 41, 42, 43, 44, 46, 49, 50, 51, 56
Roland Electrical Co. v. Walling, 325 U. S. 849, 89 L. Ed. 1970	25

Snook v. International Harvester Co., 276 S. W. 2d 658.....	27, 55
Spielmann v. Industrial Commission, 236 Wisc. 240, 295 N. W. 1.....	52, 53, 56, 57
Tennessee Coal, Iron & R. Co. v. Martin, 251 Ala. 153, 36 So. 2d 547.....	58
Tobin v. Aibel, 112 Fed. Supp. 156; aff'd, 204 F. 2d 376.....	22, 23
Tucker v. American Smelting & Refining Co., 189 Md. 250, 55 A. 2d 692	56
Walling v. A. H. Phillips, 50 Fed. Supp. 749.....	32
Walling v. American Stores Co., 133 F. 2d 840.....	49
Walling v. Goldblatt Bros., 152 F. 2d 475; cert. den., 328 U. S. 854, 90 L. Ed. 1627.....	49

MISCELLANEOUS

95 Congressional Record (1949), p. 12498.....	26
95 Congressional Record (1949), p. 12502.....	21
95 Congressional Record (1949), p. 14931.....	25
95 Congressional Record (1949), p. 14932.....	20
House of Representatives Rep. No. 1453, House Managers' Statement, 81st Cong., 1st Sess., Oct. 17, 1949.....	20, 25
Webster's New International Dictionary (2d Ed., 1954), Un- abridged	17

STATUTES

29 Code of Federal Regulations, Part 617, p. 189.....	22
Fair Labor Standards Act, Sec. 2(a).....	36
Fair Labor Standards Act, Sec. 2(b).....	36
Fair Labor Standards Act, Sec. 13(a)(1).....	48

Fair Labor Standards Act, Sec. 13(a)(2).....	
.....	2, 9, 10, 11, 18, 20, 25, 27, 28
	29, 35, 36, 40, 46, 50, 51, 60
52 Statutes at Large, Chap. 676, p. 1060.....	9
52 Statutes at Large, Chap. 676, Sec. 13, p. 1067.....	18
53 Statutes at Large, Chap. 605, p. 1266.....	18
61 Statutes at Large, p. 136.....	37
63 Statutes at Large, Chap. 736, p. 910.....	9
63 Statutes at Large (1949), Chap. 736, Sec. 13, p. 917.....	18
United States Code, Title 29, Sec. 201, et seq.....	9
United States Code Annotated, Title 29, Sec. 151.....	37
United States Code Annotated, Title 29, Sec. 213.....	18

No. 14,618

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES P. MITCHELL, Secretary of Labor, United States
Department of Labor,

Appellant,

vs.

BEKINS VAN & STORAGE COMPANY, a corporation,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

REPLY BRIEF IN SUPPORT OF APPELLEE'S POSITION.

Statement of Facts.

In order to make a complete presentation, we feel it desirable to present our own statement of facts.

Appellee is engaged in the business of moving and storing of household and commercial goods, the moving of used office equipment and furniture, the moving of stores and commercial and industrial operations, rug cleaning, fur storage, and rental of office and building space. Its principal place of business is located in Los Angeles, California [Tr. 35].

Appellee's business consists of 19 divisions, which include 36 warehouses, within the State of California. Each division covers a defined operational territory. The division is the basic organizational unit of the business for substantially all purposes. Certain divisions consist of a single warehouse. At each warehouse employees are regularly engaged in the storage, cartage, packing and handling of goods. All warehouses except one regularly engage in receiving, storing and handling of commercial goods [Tr. 35].

One of the divisions in the Southern California area is the East Los Angeles Division. This Division consists principally of five warehouses and the division office [Tr. 37]. Appellant contends that one of such warehouses (referred to herein as the "Alameda warehouse"), fails to meet the test of exemption as a retail or service establishment within the meaning of Section 13(a)(2) of the Fair Labor Standards Act.

Appellant concedes that whether considered on a division or other basis, all other divisions and all of the other 36 warehouses which are included within their respective divisions, are exempt as retail or service establishments [Tr. 126]. The Alameda warehouse alone is claimed not to be so exempt. This result is based upon the contention that this warehouse, and not the division of which it is a part, must be considered as a separate establishment and as such does not come within the retail or service exemption.

Appellee contends that the division which is the basic business and operating unit of the company, rather than just a physically separated building, is the separate establishment within the meaning of Section 13(a)(2).

The business of Appellee was commenced in 1895 in Los Angeles. Since that time it has grown and expanded principally with respect to the moving and storage of household goods. Because of expansion and growth, it has been necessary from time to time for it to acquire new warehouse space, or warehouse additions. This space has been provided in separate buildings. However, the Company could carry on its operations within the division as well or better if all of its business were carried on in a single large building instead of in five buildings geographically separated [Tr. 42, 92, 94, 138].

While it has been the policy of Appellee to decentralize its management to the maximum extent possible, the smallest unit which can best provide an efficient local organization with full responsibility for all phases of the service provided, has been the 19 divisions into which the business has been and is divided. In the Los Angeles area, these divisions consist of the East Los Angeles Division, the Hollywood District, the Beverly Hills District, the Compton-Lynwood District, the Glendale District, the Wilmington District, which includes Hermosa and Redondo, the Inglewood District, the Long Beach District, the San Fernando Valley District, the Pasadena District, the Santa Ana District and the Santa Monica District [Tr. 36].

Originally Appellee's operations in the Los Angeles metropolitan area were organized with a West Los Angeles Division and an East Los Angeles Division. The West Los Angeles Division included Hollywood, West Hollywood, Beverly Hills and Santa Monica, and the East Los Angeles Division consisted of the present geographical area. Prior to 1946, following Appellee's policy of decentralization in so far as practicable, the West Los

Angeles Division was divided into the Hollywood, Beverly Hills, and Santa Monica divisions with separate division managers at each one. In 1946 and again in 1950, the Company gave thorough consideration to the dividing into smaller units of the East Los Angeles Division and after considering the facts decided that it was not practical nor feasible to divide the East Los Angeles Division consisting of five warehouses and division office into smaller units [Tr. 37].

Each of these divisions has a division office and division manager in charge who is responsible for all operations within the particular division [Tr. 36].

Each of the warehouses within the East Los Angeles Division contains warehouse space, loading docks, packing equipment and yard area for the servicing and operation of moving vans. The East Los Angeles Division is responsible for providing moving and storage and other services throughout its territory. The territory is not further subdivided or broken down as to services to be rendered by any particular warehouse within the East Los Angeles Division [Tr. 38].

The division office and one warehouse of the East Los Angeles Division is located on Figueroa Street in Los Angeles. The Alameda warehouse is approximately $1\frac{3}{4}$ miles from Figueroa and the other four are from 1.8 to 3.5 miles from Figueroa [Tr. 38].

Of the employees working within the East Los Angeles Division, there are 11 who work at the Alameda warehouse. Of said 11 employees, one is a warehouse foreman who performs manual work [Tr. 40] but who is exempt under the Act, two are working foremen, and two are office workers who receive overtime compensa-

tion equal to that required by the Act [Tr. 39]. The remaining six are warehousemen. Except for such warehouse employees and those in the other warehouses, all employees, including management, supervision, sales, office *et cetera*, are located at the Division office.

All of the management, executive and administrative functions of the East Los Angeles Division are performed by individuals whose principal office and location is at the Division office and who give direct orders to and supervise the employees at all five warehouses in the East Los Angeles Division. These individuals make daily visits to each of the warehouses in the Division. They include a manager, an assistant manager, a superintendent, an accountant, a dispatcher, a sales manager and a storage manager. Each of these individuals performs his duties in his respective field for the entire East Los Angeles Division. Together they are responsible for the success of the operations of the Division as a whole. No one is responsible only for the success of the Alameda warehouse or any one of the other warehouses in the East Los Angeles Division [Tr. 42-43].

Appellee's East Los Angeles Division maintains moving van equipment at each of the five warehouses in the Division but all of the dispatching, and all moving orders are handled by the dispatching office at Figueroa, either by personal or telephone orders [Tr. 43].

All of the sales activities of Appellee are conducted from the Division office. Defendant has an active sales program which includes 7 salesmen for the East Los Angeles Division who are expected to and do carry on sales efforts and work in individual areas within the territory of the Division which is assigned to them. The territories of the re-

spective salesmen are assigned on the basis of approximately equal sales potential in each such territory, and without relation to the location of the warehouses within the Division [Tr. 43].

Eighty per cent of the customers of the East Los Angeles Division deal only with the Division office. Appellee runs newspaper advertisements advertising its services. The only phone number listed is that of the Division office [Tr. 44].

The principal work function of employees of the East Los Angeles Division and of the warehouses in the Division are packing, crating, loading, unloading and driving. Each of the employees of the Division will perform all of those functions at various times. Thus, most of the drivers are competent as packers and craters and most of the packers and craters are competent as drivers or helpers on moving jobs. These employees are frequently shifted back and forth from one warehouse to another within the East Los Angeles Division. For example, one or more employees are shifted to Alameda on an average of one day per week and one or more employees are shifted from Alameda to another warehouse in the East Los Angeles Division on an average of two days per week [Tr. 44].

The Company has adopted standard and thorough record keeping and control systems to measure the performance and success of its business. This is done on a division basis [Tr. 37].

The accounting records for the East Los Angeles Division are maintained at the Figueroa office as a single system of accounts and records. This Division's accounting system is the same as that used by Appellee for its

other divisions. No separate accounting records are maintained for the individual warehouses in the East Los Angeles Division. There is no need for separate accounting information for each warehouse within the Division. Furthermore, if Appellee maintained a separate system of accounting records for each warehouse within the East Los Angeles Division, the cost would be more than 100% greater than at present if the system were maintained at each warehouse, and more than 50% greater if such separate records were maintained at the Division office [Tr. 44-45].

The accounting office of the East Los Angeles Division prepares periodic financial statements including profit and loss statements and balance sheets for the Division as a whole. These are not broken down or classified in any manner for the respective warehouses located within the Division. No financial statements or profit and loss statements are separately prepared or maintained by Appellee for Alameda [Tr. 45].

A single set of bank accounts is maintained for the entire East Los Angeles Division, and all financial transactions for the entire Division, without segregation, are handled through said bank accounts. No bank accounts are maintained separately for Alameda or the other warehouses. Payroll records are not handled separately for Alameda, but are maintained at the Division office as a part of the payroll records for the entire Division [Tr. 45].

Appellee purchases some supplies in large lots for its entire operation in the Los Angeles metropolitan area. These are stored in one or another of its warehouses to be used by all of its warehouses. All other supplies for

the East Los Angeles Division are purchased by the Division in large lots for use by the entire Division. No supplies or materials are purchased separately for the needs or requirements of the Alameda or other warehouses separately [Tr. 45-46].

The East Los Angeles Division operates a repair and maintenance shop at Figueroa for all of the automotive equipment which it operates from all warehouses in the Division, and maintains there a single inventory of automobile parts and supplies for the use of the shop [Tr. 46].

It would not be practical, economic or good business practice for Appellee to divide its East Los Angeles Division into smaller management, administrative or operating units because (a) the cost of doing so would be much greater than the present costs, (b) the present single administration, management and operation permit much greater flexibility which is required for the kind of business done by the East Los Angeles Division as a whole, and (c) the type of work being handled by defendant requires the present method of management, administration and operation [Tr. 46].

All of the employees of Appellee working in its East Los Angeles Division are represented by a single local of the International Brotherhood of Teamsters Union within its jurisdiction. Such local also represents all of the union employees of Appellee working in other divisions in the Los Angeles metropolitan area. A single labor union contract uniformly applies to all of the employees of Appellee in its warehouses in the Los Angeles met-

ropolitan area, including the East Los Angeles Division. The contract applicable to all employees of the East Los Angeles Division provides that the normal workweek is 48 hours in 6 days, Monday through Saturday, overtime to be paid for work in excess of 8 hours in any one day, or in excess of the normal workweek. The International Brotherhood of Teamsters Union is one of the most powerful unions in the United States. Its representatives are familiar with and keep in close touch with the business and operating problems of the employers of its members including Appellee [Tr. 46-47].

If Appellee were forced to pay overtime to operating employees at its Alameda warehouse for work between 40 and 48 hours per week, this would upset prevailing wage patterns of Appellee and create wage inequities between groups of its employees, which, in turn, would have a very serious adverse effect upon the relations of Appellee with its employees and upon their morale. The present rates and benefits are based upon the foregoing method of operation [Tr. 47].

Statement of Legal Issue.

The issue of law concerns the meaning of "establishment" as that term is used in Section 13(a)(2) of the Fair Labor Standards Act, as amended.* Appellant contends that the Alameda warehouse alone is an establishment. Appellee contends that the East Los Angeles Divi-

*C. 676, 52 Stat. 1060, as amended by C. 736, 63 Stat. 910, 29 U. S. C. 201, *et seq.*

sion is the establishment. Appellant concedes that if the Division is the “establishment” within the organization of Appellee, it is exempt as a retail establishment within the meaning of Section 13(a)(2) [Tr. 18].

This section provides:

“Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment’s annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A ‘retail or service establishment’ shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . .”

Summary of Argument.

Appellee contends that the decision of the District Court is correct and should be affirmed because:

(1) The Division, rather than merely one of the warehouses which comprise that Division, is the proper “establishment.” Except for the physical work involved in the handling and storing goods in that building and work incidental thereto such as that of foremen necessary to directly supervise such work, all of the functions which comprise a place of business or an operating business unit—management, executive, administrative, operating, record keeping; employee relations, sales, dispatching, *et cetera*,—are conducted upon a division basis. The division, not a warehouse, is the basic business and operating unit of the company.

(2) Appellant's case is based only upon the separate geographical location of that building. Physical location alone is not a sufficient basis upon which to determine the existence of an establishment. While it may be a factor, the controlling considerations involve customary business organization, operation and practices. The purpose and application of Section 13(a)(2) requires this result, particularly in the light of its legislative history.

(3) No case that we have been able to find supports the position of Appellant in any significant way. To the extent that it is applicable, *Phillips v. Walling* (1945), 324 U. S. 490, 89 L. Ed. 1095, upon which Appellant almost entirely relies, supports the position of Appellee. The decision and the facts upon which it is based clearly demonstrate that business custom and practice must be considered. That case does not support the proposition that separate physical location is a controlling factor. The issue was not even involved there. The *Phillips* case further shows that whether the policy of the Act is being effectuated, and the practical effect of its application, are considerations in its interpretation. Appellant's position does not effectuate the policy of the Act, and runs counter to the policy of another federal statute, and is contrary to business practicalities.

(4) The interpretation of the term "establishment" under the various unemployment compensation statutes supports the position of Appellee. Similar considerations are involved in the application of those statutes.

ARGUMENT.

I.

The Separate Physical Location of a Building Comprising Only a Part of an Operating Business Unit, Does Not Constitute It as a Separate "Establishment" Under Section 13(a)(2). Business Organization and Practice Are Controlling Considerations.

A. The Facts Establish That Alameda Had No Identity Except as a Physical Location; Its Integration With the Division Is Complete.

The only identity which the Alameda warehouse has as distinguished from the East Los Angeles Division is that it is geographically separated from the office of the Division and from the other warehouses comprising the Division. The Alameda warehouse is an integral part of Appellee's East Los Angeles Division. This fact is established by uncontradicted evidence:

(1) The Alameda warehouse along with other warehouses in the Division is managed from the division office [Tr. 36].

(2) Each of the warehouses performs substantially the same function of packing, storing and moving goods of various kinds, both commercial and household [Tr. 35, 38].

(3) The division is the smallest administrative and operating business unit of the Company [Tr. 38, 46].

(4) Records for all warehouses, including payroll records, are kept only at the Division office [Tr. 40, 44].

(5) Supervision for the warehouse operation is provided by the Division [Tr. 42-43].

(6) The highest level of supervision at the Alameda warehouse is that of foreman, a position which involves manual work* [Tr. 40].

(7) Responsibility for successful operation is upon a division, not a warehouse basis. No one is responsible for the warehouse alone [Tr. 42-43].

(8) All dispatching and orders are handled from the Division office [Tr. 43].

(9) Sales activities are conducted on a division basis, and sales territory is allocated without regard to location of individual warehouses [Tr. 43].

(10) Almost all contact with customers is handled by the Division [Tr. 44].

(11) The working force in the Division is interchangeable, and in fact employees are frequently shifted among warehouses [Tr. 44].

(12) A single system of accounts and records for all warehouses is maintained for the entire Division at the Division office with no separate accounts at or for the individual warehouses [Tr. 44].

*Appellant refers to this foreman as an "executive" employee (App. Br. pp. 5, 15). While he may be so under the regulations issued by Appellant, this is its own conclusion. Appellee, of course, cannot control whatever designations Appellant may make. Nor can Appellee be bound by any such characterization in this case. This is particularly true where Appellant goes to the extent of implying facts via its regulations which do not appear in, indeed are contrary to, those in the record, as where by its own definition it purports to show that this foreman is in "sole charge of an independent establishment or a physically separated branch establishment" (App. Br. p. 15 fn. 6). Appellant cannot be heard to supply factual deficiencies in the record to support its case by references to regulations not even in issue.

(13) No separate financial statements are made for each warehouse; all are on a division basis [Tr. 45].

(14) Only one bank account is maintained for the entire Division [Tr. 45].

(15) All supplies used by the various warehouses are purchased either on a company-wide or division-wide basis [Tr. 45-46].

(16) Repair and maintenance of automotive equipment is handled only on a division-wide basis [Tr. 46].

(17) It would be inefficient to administer the company on a separate warehouse basis [Tr. 46].

(18) All employees of the Division are represented by a single local of the Teamsters Union, one collective bargaining agreement applying uniformly to all [Tr. 46-47].

The Alameda warehouse is therefore clearly not a place of business or an operating business unit in any ordinary or usual sense. The only function performed there is the physical one of moving and storing goods and incidental activities such as the routine junctions of the office workers. This involves only those employees necessary to accomplish this work together with those who are required to directly supervise the work of such employees at the first level and who themselves engage in such work. All other functions which comprise a place of business or an operating business unit—management, executive, administrative, operating, record keeping; employee relations, sales, dispatching and all supervision above the level of foreman—are conducted upon a division basis.

The Alameda warehouse, therefore, is part of an integrated operation only physically removed from the management offices of the Division. The building could be a

physical part of the Division office without any significant change being necessary in the organization or operation of the business.

Indeed, it was specifically found by the trial court that defendant could carry on its operations in the East Los Angeles Division as well or better if all of its business in the Division were carried on in a single large building instead of five buildings geographically separated [Tr. 42]. This finding is supported by uncontradicted evidence [Tr. 138, 92, 94-95].

Appellant challenges this finding but nowhere is the challenge supported by reference to any evidence which would even suggest a contrary finding. Appellant makes much of the alleged reason for the physical separation. This however does not challenge the correctness of the finding which is to the effect that whatever the reason for the separation, the operations could be carried on as well or better in a single building. Appellant labels the findings a "speculative" or as "theorizing." On the contrary the finding is one of *fact* based upon uncontradicted expert testimony. Mere characterization is an insufficient basis upon which to attack a finding.

Several of the Company's divisions, as the statistics show [Tr. 35, 37], consist of only one warehouse. Appellant fails to show any valid reason why a division with more than one warehouse should be treated differently from a division with only one warehouse.

Appellant's case must be based entirely upon the single fact that the Alameda warehouse is separated geographically from the Division office. Appellant must concede that all of the business functions other than the physical work of moving and storing goods and the supervision and office

work directly incidental thereto, are conducted upon a division basis.

If Appellant's contention were adopted where, for example, would the line be drawn? If because of lack of space in a large central warehouse, part of the warehouse space were removed to an immediately adjacent building directly connected by passageways with the main warehouse, would it then become a separate establishment? What if the building were moved across the street connected by an overhead walkway? Would it make a difference if the walkway were then removed? Certainly Congress could never have intended that the removal of so tenuous a connection should be the criterion in determining whether or not a separate establishment existed. Would the result then be different if the building were moved a block or two away? It seems very clear that physical location alone cannot be the controlling factor.

Judge Carter, at the trial, stated:

"What constitutes an establishment will depend upon the particular facts in each case. Certainly, it cannot be determined by the application of a geographical yardstick. For example, whether a warehouse used by a retail establishment is in an adjacent building, across an alley, across a street, around the corner or a mile or two away, is certainly not the test for determining whether the warehouse and the retail store constitute one establishment" [Tr. 142].

* * * * *

"If these five warehouses were located side by side down on Figueroa Street, I don't think plaintiff

would seriously contend that they were separate establishments. Or suppose four of them were located there and one of them was located out where it had a spur track, I don't think there would be any contention that they are separate establishments" [Tr. 146].

Even though naturally general in its definition, the dictionary shows that the word "establishment" means more than a single geographical location and includes the concept of a going business, organization or operational unit. Thus, Webster's New International Dictionary, Second Edition, Unabridged (1954) defines "establishment" as follows:

" . . . c) A permanent civil, military, or commercial force or organization. (d) the place where one is permanently fixed for residence or business; residence, including grounds, furniture, equipage, retinue, etc., with which one is fitted out; also a situation or place of business with its fixtures and organized staff; as, a large *establishment*; a manufacturing *establishment* . . ." (Emphasis in quotation.)*

The dictionary definition has been referred to in a number of the cases discussed below.

We believe that ordinary and customary business practices are determinative in this case. There is much authority to support this result, but none to support the contrary result.

*All italics ours unless otherwise indicated.

B. Section 13(a)(2), as Amended.

Section 13(a)(2), the application of which is in dispute in this case, was amended and radically changed in 1949. Prior to its amendment this section merely provided for exemption with respect to “any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in the intra-state commerce.” (Chap. 676, Sec. 13, 52 Stat. 1067; Chap. 605, 53 Stat. 1266, 29 U. S. C. A., Sec. 213, [1947 Ed.].) As amended in 1949, the section reads as follows:

“Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment’s annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A ‘retail or service establishment’ shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . .” (C. 736, Sec. 13, 63 Stat. 917 (1949), 29 U. S. C. A., Sec. 213.)

While the prior section may have involved some of the same considerations as those required under the amended section, the new section is more specific in detail and is most relevant as applied to the facts in this case. It will be noted that the amended section specifically refers to “annual dollar volume,” to “sales of goods or services,” to “not for resale” and to the “particular industry.” Put together the reference is to the annual dollar volume of sales of goods or services made by the establishment within the state in which the establishment is located.

The clear purport of this section denies any reference to geographical location alone as being a criterion in determining the application of the exemption. The reference is to an operating business unit. How else could the annual dollar volume of sales be determined? Not one of the references in the amended section would apply to the Alameda warehouse. If it were determined to be an establishment, how could its annual dollar volume be determined? The Company would have to fundamentally alter its method of doing business carried on for half a century. Dollar value sales records and all other accounting and sales management methods are determined on the basis of the Division.

It is therefore clear that if geographical locations were a controlling factor, the tests which Congress adopted would have to have been otherwise stated. The fact that they were stated as they were shows that it is not the geographical location of a particular building which is to control, but rather the existence of a place of business or an operating unit thereof.

C. The Legislative History of Section 13(a)(2).

The legislative history preceding the 1949 amendments to the Act emphasizes the fact that Congress had in mind some reasonable relationship to ordinary business practices. In this case the business practices of Appellee have been substantially the same since its founding in 1895. Under those practices a single warehouse has had no significance as a separate business unit. It has merely been a physical part of the basic unit of the business, the division. To ignore these business practices would not only do violence to the clear intent of Congress, but would

base a distinction upon considerations that are not significant in the business operation.

The legislative history of the amendment to Section 13(a)(2) shows that physical location is not a controlling criterion in the application of that exemption. In the *House Manager's Statement* explaining the bill which was later enacted without change, the following is stated:

"The location of the establishment, whether in an industrial plant, an office building, a railroad depot, or a Government park, etc., will make no difference in the application of the exemption.

* * * * *

"Since, however, the exemption does apply to any employee employed 'by' an exempt retail or service establishment, it is applicable to employees of an exempt retail or service establishment working in a warehouse operated by and servicing such establishment exclusively, whether or not the warehouse operation is conducted in the same building as the selling or servicing activities."

House Managers' Statement, H. R. Rep. No. 1453, 81st Cong., 1st Sess. Oct. 17, 1949; 95 Cong. Rec. 14932 (1949).

Senator Holland, the sponsor in the Senate of the amendment to Section 13(a)(2) which was later enacted into law, had the following to say concerning the interpretation of that section in the light of business realities:

". . . The Congress used the terms 'retail' and 'service establishment' in their customary meaning, in their customary application, as they were custom-

arily understood in the various industries of the Nation. How anyone, now, could oppose the giving of that concept to complete reality through this amendment, I fail to see, because it would simply carry out clearly what was the intention and objective of those who offered the original act, and those who voted for it and brought it to passage.”

95 Cong. Rec. 12502 (1949).

Concerning the meaning of a retail sale or service, Senator Holland stated:

“The question is what constitutes a retail sale and what constitutes service, and in each case that is not defined in the act, but instead is defined variably in various industries by determining what are the habits and practices in the industry.

* * * * *

“There could be various criteria which could be applied, one of which of course would be the conclusion of the trade association in the particular industry. But that is only one criterion. Others would apply. The well-settled habits of business must be applied. They will not necessarily be the same in all trades or businesses.”

95 Cong. Rec. 12502 (1949).

In the cases which are discussed below, there has been a consideration of business practices in determining the meaning of the term “establishment.” In no case has physical location alone been found sufficient to justify a finding that a separate establishment exists.

D. Appellant Itself, in Other Cases, Has Taken the Position First, That Geographical Considerations Are Not Controlling, and Second, That Business Usage and Practice Must Be Considered.

Appellant itself has conceded, indeed urged, in an action under the Fair Labor Standards Act, that a separate physical location should not determine the existence of a separate establishment.

Thus, in *Tobin v. Aibel* (D. N. Y. 1952), 112 Fed. Supp. 156, *affd.* (2d Cir. 1953) 204 F. 2d 376, the Department of Labor sought an injunction against the defendant restraining the use of home workers. This action was commenced pursuant to "Knitted Outerwear Industry, Minimum Wage Order" (29 C. F. R. Part 617); issued under the Fair Labor Standards Act. These regulations generally provide that in order for home work to be done in this industry, it is required that a certificate be obtained from the Department of Labor. Such certificates were denied to defendant and the major issue in this case was whether defendant's operations came within the Knitted Outerwear Industry definition. This definition provided:

"The knitting from any yarn or mixture of yarns and the further manufacturing, dyeing or other finishing of knitted garments, knitted garment sections, or knitted garment accessories for use as external apparel or covering which are partially or completely manufactured in the same *establishment* as that where the knitting process is performed; . . .
* * *

29 C. F. R. Part 617, p. 189.

Defendants sought to avoid coverage under this definition by showing the basic fabric of the knitted garment was prepared at one location in New York and was distributed to the home workers at a second location. The determination of the case depended upon whether the geographically separate locations constituted one establishment. In granting the injunctive relief as petitioned for by the Department of Labor, this court said:

“Some minor disputes are lately resolved. In the first place the defendants argue that the maintenance by them of a separate physical establishment (at East 109th Street) is of great significance. I think it is not. It must be manifest that the purposes of the act are not so easily frustrated, as in fact they would be if the act and the regulations for the particular industry were inapplicable when the operations are conducted in two physically separate premises.

* * * * *

“I believe that defendants’ operation is within the regulations and that plaintiff is entitled to an injunction which it seeks. I do not rest this decision solely on the broad sweep of the word ‘establishment’, nor solely on control of the corporation by the partnership, nor solely on the fact that a very substantial part of the business of both entities is conducted in the same premises, nor solely on the fact that the partnership habitually consumes the entire production of the corporation. I believe that all of these facts taken in conjunction point irresistably to the conclusion that there is but one ‘establishment,’ and that the operation is clearly within the language of the relevant regulation.”

Tobin v. Aibel, 112 Fed. Supp. 156, 158.

In *Phillips v. Walling* (1945), 324 U. S. 490, 89 L. Ed. 1095, Appellant itself, a party in that case, advocated the position which was accepted by the Court, that business usage and practice should be considered. As stated in the summary of argument preceding the case report, Appellant argued:

“Under common business and governmental usage each unit of a chain store system is a separate ‘establishment’ and a chain store warehouse is not a ‘retail establishment.’ ”

* * * * *

“The Policy of the act as a whole strongly supports the accepted governmental and business meaning of the words.”

Phillips v. Walling, 89 L. Ed. 1096, 1097.

That position taken in the very case upon which Appellant principally relies here, should be contrasted with the position taken in this case where Appellant argues directly to the contrary.

E. Appellants Cannot Base a Distinction Between Alameda and the East Los Angeles Division Upon the Fact That the Former May Store More Commercial Goods Than the Other Warehouses Making Up the Division.

Appellant in its brief seems to emphasize the fact that a significant part of Alameda’s business is the storage of commercial goods. It does so by referring to the size of the building, its location and facilities (App. Br. p. 15). However, whether the warehousing service is to commercial or non-commercial users is irrelevant.

A distinction cannot be made between the warehouses in the Division or between the Alameda warehouse and the Division upon the basis that more commercial goods are handled at the Alameda warehouse than at the other

warehouses. In the first place, some commercial goods are stored at all of the warehouses in the Division, indeed, in all of the warehouses of the Company wherever located except one.

But more important, Congress has eliminated the distinction formerly drawn by the Administrator between sales and services to commercial users and sales and services to non-commercial users. Sales and services to commercial users can be retail as well as those to non-commercial users.

The United States Supreme Court prior to the 1949 amendments had held that a sale to a commercial user could not be a retail sale within the meaning of Section 13(a) (2). (*Roland Electrical Co. v. Walling* (1945), 325 U. S. 849, 89 L. Ed. 1970.) Congress specifically overruled this conclusion when it amended Section 13(a)(2) in 1949. The following excerpts from the Congressional History will remove any doubt in this connection.

The House Managers' Statement explaining the bill which was enacted without change, states:

"The amendment (sec. 13(a)(2)), agreed to in conference clarifies the existing exemption by defining the term 'retail or service establishment' and stating the conditions under which the exemption shall apply. This clarification is needed in order to obviate the sweeping ruling of the Administrator and the courts that no sale of goods or services for business use is retail. See *Roland Electrical Co. v. Walling* (326 U. S. 657); *McComb v. Diebert* ((E. D. Pa. 1949), 16 Labor Cases Par. 64,982); *McComb v. Factory Stores* (81 F. Supp. 403 (N. D. Ohio 1948))."

H. R. Rep. No. 1453, 81st Cong., 1st Sess., Oct. 17, 1949; 95 Cong. Rec. 14931 (1949).

Senator Holland, the sponsor of the amendment in the Senate which was later enacted into law, in criticizing the position of the Administrator concerning business or commercial sales, said concerning the Amendment:

“ . . . we propose to do away with this artificial distinction between a retail sale on the one hand and a business sale on the other, which, regardless of the size, and regardless of the fact that it is intrastate, can never be held to be a retail sale under the regulations or under the interpretative rulings of the Administrator.”

95 Cong. Rec. 12498 (1949).

Appellant's contention of necessity requires that customary business organization and practices be entirely ignored and that physical location alone should be the test. No court decision sustains this proposition. The courts as well as Congress in clear pronouncements establish business organization and practices as an important, if not *the* important criterion. Aside from such considerations, physical location alone is insufficient. Even Appellant has advocated a different view in other cases.

If physical location were to be adopted as the criterion where again would the line be drawn? What would be the situation if several buildings adjacent to each other and on the same property, each with several employees, existed with only one working foreman present? Would each building be a separate establishment? What if a group of employees worked in separate buildings with sufficient skill so that even a working foreman was not necessary except for periodic visits? If the facilities were provided in several buildings which existed separately at a given location instead of being located in several floors in one building, would this mean that each because of

separate physical location would be an establishment? If so, then each floor is also in a separate physical location—indeed so is each employee on that floor.

In answering a contention that a foundry and machine shop constituted separate establishments for unemployment compensation purposes, because of differences in type of work, terms of employment, immediate supervision and union representation, the Court in *Snook v. International Harvester Co.* (Ky., 1955), 276 S. W. 2d 658, discussed below, said:

“To follow their argument to its logical conclusion, each *employee* would constitute a separate establishment because he is separately employed, works under different conditions, has a different seniority, etc.”

Snook v. International Harvester Co., 276 S. W. 2d 658, 661.

II.

Appellant Relies Principally Upon the Case of Phillips v. Walling (1945), 324 U. S. 490, 89 L. Ed. 1095. To the Extent That It Is Applicable, This Case Supports Appellee's, Not Appellant's Position.

In the *Phillips* case, decided prior to the 1949 Amendments, the issue was whether employees working in the central office and warehouse of an interstate grocery chain store system, were employed in a retail establishment within the meaning of Section 13(a)(2). The company operated a chain of 49 grocery stores in two states. Quite apart from the retail stores the company operated a distributing system consisting of the ordinary wholesaling function. This operation included a separate office building and warehouse where the employees involved worked. The office and warehouse served all of the 49 stores.

The Court held that the employees of the central office and warehouse were not exempt under Section 13(a)(2).

The principal grounds for the decision were that the company carried on both retail and wholesale operations, that the function of the central office and warehouse in distributing goods to the various retail stores was a wholesale function, that the fact that the company operated both wholesale and retail operations did not mean that the wholesale function would thereby take on the characteristics of a retail function within the meaning of the Act, and that while the retail stores were exempt from the Act the wholesale operation was not so exempt.

The defendant in that case of necessity had to contend that the entire business operation of the company constituted the retail establishment even though a division of it was a wholesale operation. The *Phillips* case decided that the term "establishment" was not necessarily the equivalent of an entire business entity, but could be a separate operation or division within the business.

We do not take issue here with such a holding. It appears to us to be a logical result. But we fail to see how it assists Appellant's position.

We have not contended that the entire Company operation is a single establishment. We have merely urged that the divisions, of which there are 19, rather than each single warehouse which is only a part of the division, is the smallest unit of the Company which can be constituted an establishment upon any reasonable basis.

The *Phillips* case supports the position of Appellee. It shows that an establishment is a place of business, not just a geographically separate building or location. It specifically recognizes that normal and customary busi-

ness organization is a criteria that must be considered in determining what constitutes a separate establishment.

In these respects, the Court said:

“But if, as we believe Congress used the word ‘establishment’ *as it is normally used in business and in government*—as meaning a distinct physical *place of business*—petitioner’s enterprise is composed of 49 retail establishments and a single wholesale establishment. Since the employees in question work in the wholesale establishment, §13(a)(2) is plainly irrelevant.”

Phillips v. Walling, 89 L. Ed. 1095, 1100.

This quotation clearly specifies that in determining the meaning of establishment, normal business practices must be considered. This statement also shows that it is not the separate physical building which is the criterion but rather the distinct physical *place of business*. The statement not only refers in the same sentence to a place of business but also to the term establishment “as it is normally used in business and in government . . .” This is the heart of Appellee’s position, namely, that the realities of business practices and bona fide business organization must be considered in determining what constitutes an establishment under Section 13(a)(2), and it is confirmed in the one case most heavily relied upon by Appellant.

Even the term “physical” in the quotation is dictum since the Court’s decision was based upon a separate *function* not a separate *location*.

Appellant states that “Since the Supreme Court’s decision in the *Phillips* case it has been settled that . . .

organizational structure is irrelevant in determining what is an 'establishment.'” (App. Br. pp. 10, 18). This statement is wholly erroneous. To the extent that this matter was settled by *Phillips* it was settled directly to the contrary—as *Appellant specifically argued in that case*.

This contention, erroneous as it is, is nevertheless the basis of Appellant's entire position in this case. Appellant throughout its brief on numerous occasions quotes the phrase “a distinct physical place of business” out of the *Phillips* case context and constructs its case upon that phrase. Yet nowhere in the entire brief is a quotation of the context—not even of the sentence—out of which that phrase was taken.

The sentence and the context completely refute any contention that organizational structure should not be considered, to say nothing of a contention that the matter is “settled” that it should not be.

Appellant, who was also party to the *Phillips* case, specifically argued in that case that common business and governmental usage and practice should be accepted. The Court agreed. But now Appellant changes its position and argues that it is settled that organizational structure cannot be considered. We believe that its first position, that advocated in the *Phillips* case, was correct.

Organizational structure is a part of business usage and practice. Otherwise the reference in the *Phillips* decision to normal business usage would be meaningless. The *Phillips* decision did not hold, indeed it did not even state, that organizational structure was not a consideration. On the contrary, the decision was based upon the organizational separation of functions. It held that business practice was a basic consideration.

Appellant, after listing various cases, further states:

“The above decisions also make it clear that the principle of the *Phillips* decision is applicable even in the absence of geographical separateness. If units of a multi-unit organization are distinct from each other, they are separate ‘establishments’ for purposes of the ‘retail establishment’ exemption, even though located in the same building.” (App. Br. p. 14.)

This statement concedes that geographical separateness is not a controlling consideration. But if physical location is not a test, and organizational structure or business practice is “irrelevant,” what test exists? Appellant does not supply this basic deficiency even in argument in support of its own case.

The factual distinctions between the *Phillips* case and the instant case are at once apparent.*

In the first place, the wholesale function was self sustaining. It was a separate function and business operation distinct from the retail operation. It was specifically compared by the Court with the independent wholesaler in function and operation. The Court states that the employees involved were performing duties which were “economically, functionally and physically like those of the independent wholesaler’s employees . . .” (89 L. Ed. 1101). The Court would have had no occasion to refer to such factors if physical location were the controlling criterion.

*Appellant states (App. Br. p. 11) our contention to be that the *Phillips* doctrine is limited to chain store enterprises. We have not taken and do not take such a position here. It is not necessary to do so. It was Appellant who unsuccessfully endeavored to develop that concept as the record of testimony will show.

The trial court in the *Phillips* case (D. Mass., 1943), 50 Fed. Supp. 749 found the following facts, among others:

“The defendant maintains separate accounts for each store. It keeps a record of the inventory of each store and of transfers of goods from one store to another, and a record of the cash deposits of each store. Merchandise is supplied to each store on the basis of requisitions prepared by the individual store manager, subject to revision by one of the three superintendents, each of whom supervises a group of stores.”

* * * * *

“ . . . Invoices are made out for each shipment of goods from the warehouse to each store, and separate accounts and inventories are maintained for each retail store.”

“ . . . When more than one store is situated in a particular city or town, they generally are so located as to serve distinct competitive areas, and not to supplement each other’s service to the same section of the consuming public.”

Walling v. A. H. Phillips, 50 Fed. Supp. 749, 750, 751.

This quotation shows the facts to be quite different from the statement of Appellant (App. Br. p. 12) which indicates that the central office prepared payrolls, kept inventories, ordered goods, collected daily cash receipts, etc. for the group of stores as a whole. They were in fact all kept separately for each store. This is opposite from Appellee’s practice where no breakdown exists for each warehouse.

In the instant case, the Alameda warehouse is an integral part of the Division operation; it has no separate management, supervision or record keeping. It is in no sense a separate and distinct business operation or subdivision. The basis of the decision in the *Phillips* case was that there was a distinction between entire functions, not between buildings. The Court thus separated the wholesale function, a separate operating part of the business, from the retail function. In the instant case there is no such distinction whatever. The integration of the Alameda warehouse with the division is complete.

Another clear distinction from the *Phillips* case is the fact that in that case the wholesaling function was of the conventional nature, distributing goods as would be true with an independent wholesaler distributing to 49 retail stores. The 49 retail stores were, of course, within the exemption. In this case the Alameda warehouse performs no such wholesaling function. It does not service the other warehouses either in the East Los Angeles Division or in any of the other divisions. In the organization of the company and in its function, it is on the same level and performs the same function as do the other warehouses in the Division. In no sense can its function be separated from the other warehouses or from the Division in the manner in which the wholesale function was separated from the retail function in the *Phillips* case.

Since the decision only involved the question as to whether the wholesale function was separate from the retail function for the purposes of the Act, the Court was not required to consider the relationship of one retail store to the other. For the purpose of the decision, it assumed that each was a separate business operational

unit—a separate retail store or establishment. However, the case does show that each store had a manager, separate accounts, its own record of inventory and transfers of goods, and its own records of cash deposits, that each store manager prepared its own requisitions, and that each was so located as to serve distinct competitive areas so as not to supplement each others' services.

The opinion also shows that the wholesale function would be substantially the same whether provided by an independent wholesaler or by the wholesale operation of the same company.

So far as appears from the decision, the employer in the *Phillips* case made no vigorous effort to show a single management, administrative organization, or accounting operation, including both the warehouse and the 49 retail outlets. It would be unlikely that such a large operation in many locations could be carried on as a single management operation. Yet the defendant in that case to succeed had to show that the warehouse and all of the retail outlets, or that the warehouse and any one or more of the store locations, constituted one establishment. Doubtless it was difficult to make such a showing. As a result, the decision based upon the facts in that case is a likely one.

In the instant case, however, the factual situation is quite different. Here there are five geographically separate warehouses merged completely in a single operating unit, all rendering the same type of service. Together they are the smallest unit that can be considered as a "place of business" and as a single establishment. The *Phillips* case in no way denies—indeed confirms—such a result. It is not authority for Appellant's position here.

In the *Phillips* case, therefore, the basic business unit was the retail store. The comparable basic unit in the business of Appellee is the Division. There can be no other comparison. It would be wholly unrealistic to compare the Alameda warehouse with a retail store. The only remote comparison would be if a given retail store consisted of five buildings instead of one large one and the holding had been that each building was an establishment. But there is no comfort to be found in the *Phillips* case in support of this proposition.

A. The 1949 Amendments Enacted After the Phillips Decision Confirm Its Support of Appellee's Position.

The *Phillips* case was decided under the law as it existed prior to 1949. The legislative history of the 1949 amendments affirmed the *Phillips* case but in doing so established new tests and emphasized the fact that the important, if not controlling criteria in determining what constituted an establishment, were to be based upon customary operating practice and business usage. There is no indication that the geographical location of a building was to be determinative of this question. That it could not be is shown by the facts in this case.

Under the old law the only test was whether an establishment was mainly engaged in intrastate commerce. The present section is completely different and requires an analysis of the company's business organization and practices and not the mere matter of geography alone. Under the amended section it is clear that consideration must be given to the operational, financial and accounting organization of the business. The whole basis of Section 13(a)(2) pertains to the volume of sales and revenue of the company.

One of the bases for the amendment to Section 13(a) (2) was that business realities had been ignored. This has been shown by the quotations from the legislative history set forth above. But even the language of the section itself confirms the intent to require a consideration of business practices. It specifically sets up as one of the tests—a recognition “*in the particular industry*” of sales as retail.

**B. The Policy and Purposes of the Act Must Be Considered
in Its Application.**

The Fair Labor Standards Act has been treated in the *Phillips* case and in numerous other decisions as being a humanitarian statute. The Act specifically refers to the existence of “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well being of workers.” (Sec. 2(a)) and of its purpose “to correct and . . . eliminate” such conditions (Sec. 2(b)).

The basic purpose of the Act is thus stated. The courts, including the United States Supreme Court in the *Phillips* and other cases, have considered such a purpose in interpreting the Act. We believe it should also be considered here.

The acceptance of Appellant’s contention could in no way effectuate the purpose and policy of the Act. On the contrary, it would upset an agreed and mutually satisfactory labor-management relationship which is the basic policy of another federal statute, the Labor-Management Relations Act of 1947, as amended. This Act declares that the public policy of the United States is to encourage:

“ . . . the practice and procedure of collective bargaining and [the protection of] the exercise by work-

ers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment. . . .

* * * * *

“. . . practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions,”

61 Stat. 136, 29 U. S. C. A., Sec. 151.

It is precisely the effectuation of this policy which the agreement between the Appellee and the Teamsters Union promotes. The employees involved are represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of North America. The Court below found that:

“The International Brotherhood of Teamsters Union is one of the most powerful unions of the United States. Its representatives are familiar with and keep in close touch with the business and operating problems of the employers of its members including defendant.” [Tr. 47.]

This fact, even if not found, is so well known that the Court could take judicial notice of it. The Teamsters Union has negotiated a collective bargaining agreement [Tr. 20 *et seq.*] with Appellee which provides in detail for the wages, hours and working conditions of the employees involved in this case. Even a cursory glance at this agreement will show that no problem of the maintenance of a minimum standard of living is involved. This Union, which is familiar with the business and operating problems of Appellee and other employers in the industry, has

negotiated a normal workweek of forty-eight hours consisting of six eight-hour days.

The only logical conclusion is that the Appellee and this powerful union have concluded that a six-day-straight-time workweek is most appropriate for this industry. This is particularly true when it is considered that employees at the warehouse not represented by the Union and in a different category where the forty-hour week is no problem, are paid overtime after forty hours per week [Tr. 39]. Furthermore, in negotiating the straight-time hourly rate, the realities of labor-management relations demonstrate that the straight-time hourly rate agreed to would take this workweek into account.

We believe that this Court may also judicially notice the fact that in most industries the prevailing pattern of negotiated contracts provides for overtime after 40 hours of work per week (five eight-hour days) and after eight hours in any one day. This is reflected in the requirements of the Fair Labor Standards Act. Yet here, one of the most powerful unions in the country has willingly agreed to a six-day week with overtime after 48 hours rather than after the prevailing 40 hours. Again, the only logical conclusion is that this Union recognized the realities of Appellee's business operations and has agreed to a workweek which differs from that prevailing elsewhere. The fact that it has done so is most significant.

We, of course, realize that the agreement of the parties cannot take precedence over the requirements of the Act. However, the foregoing considerations are most relevant in resolving the disputed meaning of the Act in this case. The courts, including the United States Supreme Court in the principal case relied upon by Appellant, have shown

that such considerations are proper in such cases. Specific reference has been made in interpreting the Act to its basic policy and purposes. Furthermore, the acceptance of Appellee's position would effectuate the policy of the Labor-Management Relations Act without contravening that of the Fair Labor Standards Act.

In this case there is no basis for urging the application of the Act to effectuate its policy or humanitarian purpose.

As stated by Judge Carter during the trial of this case:

“ . . . I have listened to all the talk about how the new administration was going to get the administrative agencies down to business, and here I find them worrying about ten employees who are members of the Teamsters' union, and the Court will take judicial notice of the status of the Teamsters' union—I used to do some labor work, I never represented the Teamsters, but I know something about them—ten employees they are trying to bring within the Wage and Hour Act.

“I don't know. I shouldn't comment, because I don't know what other business your department has pending. I know some of the cases are closed by consent decrees, but it is certainly a disillusionment for me to find an administrative agency straining to extend the coverage of this Act over these ten employees.” [Tr. 105-106.]

The considerations which resulted in the agreement between Appellee and the Teamsters Union are set forth in the Findings of Fact [Tr. 47-48]. The overtime rate after 40 hours for operating employees at the Alameda warehouse would upset Appellee's prevailing wage patterns, create wage inequities between groups of its employees

and adversely affect employee morale. Furthermore, Appellee handles a greater volume of business on Saturdays. If overtime were required for this day, *i.e.*, between 40 and 48 hours of work, Appellee would have to increase its rates. The volume of business would thereby be substantially decreased, because more persons would handle their own moving or find other ways of meeting the problem by means of trailers and rental trucks. Appellee could not close its Alameda warehouse after 40 hours had been worked in a workweek because the Teamster contract provides a normal workweek of 48 hours, Monday through Saturday, and requires a reopening in the event of a change. .

These are all substantial considerations undoubtedly reflected by the collective bargaining agreement between Appellee and the Teamsters Union.

C. The Practical Business Consequences of the Interpretation of the Act Is a Consideration in Determining Its Meaning.

The United States Supreme Court in the *Phillips* case, found that to reach a contrary result, namely, to hold that the wholesaling operation of a chain store system is included as part of the same establishment as the retail operation, would discriminate against independent wholesalers which had no retail operation. Thus, in the *Phillips* case, the Court stated:

“These duties, rather, are economically, functionally and physically like those of the independent wholesaler’s employees who, when engaged in interstate commerce, are admittedly entitled to the benefits of the Act. We fail to perceive in Sec. 13(a)(2)

or in its Congressional background any intent to discriminate against chain store employees engaged in wholesale activities or to give to chain store warehouses a competitive advantage in labor costs over independent wholesalers.”

Phillips v. Walling, 89 L. Ed. 1096, 1101.

The courts in other cases such as *Burhans v. Montgomery Ward & Co.* (S. D. N. Y., 1952), 110 Fed. Supp. 184, discussed below, have also considered this factor. In that case the Court said:

“Judge Soper did not consider a physical connection between the warehouse and the retail store essential to an application of the exemption provisions of Sec. 13(a)(2) of the Act. A similar ruling had been made in *Duncan v. Montgomery Ward & Co.*, D. C., 42 F. Supp. 879. Any other interpretation would result in conferring on a large retail store, that was so fortunate as to have an adjacent building as its warehouse, an unfair economic advantage over a large retail store that had its warehouse a mile away from the store itself. Interpretations of the statute that would result in any such discrimination are to be avoided.”

Burhans v. Montgomery Ward & Co., 110 Fed. Supp. 184, 196.

In determining therefore what the term “establishment” means, the courts have considered the possible effect of the determination not only upon the company, but upon business activities in industry generally. In the *Phillips* case, a consideration was that the practical effect would result in discrimination against independent wholesalers.

In the instant case for exactly the same reason the practical effect should also be considered. In this case, were Appellant's contention upheld, a "discrimination" of a different type would exist within the Company. It would mean that one warehouse out of five in the East Los Angeles Division (and out of 36 throughout the Company's operation) would have overtime compensation provisions, record keeping requirements and consequent conditions different from all the rest. Instead of a uniform operation recognized both by the industry and the Union with which it contracts, one warehouse would have to be separately treated. This would create a situation and operation problems which would certainly be as acute to the company as would be the possible discrimination referred to in the *Phillips* and other cases. The avoidance of such a situation and of such an illogical result should be a consideration in determining whether one warehouse alone out of the five in the Division should be singled out for separate treatment as an "establishment."

The *Phillips* case, therefore, is authority for the position of Appellees in that it holds first, that the place of business and not just a geographically separated building is the criterion, and second, that as contended by Appellant in that case, common business and governmental usage and meaning must be considered in determining what is meant by "establishment." Under either criteria, the Division and not the Alameda warehouse is the establishment.

The case also shows that the policy of the Fair Labor Standards Act and the practical consequences of its application, must be considered in its interpretation.

III.

Decisions Since the Phillips Case Also Confirm the Correctness of Appellee's Position.

Several decisions concerning the meaning of the term "establishment," have been rendered by various courts, both before and after the *Phillips* case was decided. While perhaps more akin to the *Phillips* case situation than to that involved here, they are nevertheless persuasive authority in support of Appellee's position.

In *Burhans v. Montgomery Ward & Co.* (S. D. N. Y., 1952), 110 Fed. Supp. 184, the company operated a retail store, a part of which was a warehouse or stockroom for the storing of merchandise handled by the store. The business expanded and to provide additional warehouse space, a building approximately one mile distant was obtained. The merchandise received and stored in both buildings was carried in a single inventory. Both were under common supervision. The manager of the store was responsible for every phase of the operation including both warehouses and was assisted by two assistant managers. A single local union represented the employees of both the store and the warehouse under a single agreement.

On all company records, both buildings were treated together as a unit including the monthly sales and profit and loss statements, inventory and other statistics and data. A single bank account was maintained and disbursements were made for both locations as a unit. A single payroll was maintained. Management functions were performed and records kept at the original location for both buildings. The warehouse building and ware-

house facilities at the original location served only the single retail store.

The facts, therefore, are very close to those involved in the instant case except that here the warehouse does not even service another part of the Company's business.

The Court considered the *Phillips* case and its applicability to the facts before it. It held that the *Phillips* case was not controlling stating that "The warehouse in the case at bar does not in any important particular fit the description of the warehouse in the *Phillips Co.* case." (110 Fed. Supp. 195.)

The Court then stated:

" . . . The warehouse was not physically connected with the Albany retail store, but was a mile away; however, that is not determinative of the issue. In every other way it was part and parcel of the Albany retail store. It is the use made of the warehouse, not its location, that is important. A large retail store requires adequate space to store its stock. This it may do in the same building in which the store displays its merchandise for sale if suitable space is available; or it may store part of its stock in some local building whose location may depend on many collateral considerations. But if the function of the warehouse is solely to supplement and complete the functions of the retail store, and if the warehouse is in effect operated as a part of the retail store although not physically connected with it, the warehouse would, in my opinion, be part of the 'retail establishment.' "

Burhans v. Montgomery Ward & Co., 110 Fed. Supp. 184, 196.

The Court also referred to various Interpretative Bulletins of the Wage and Hour Administrator as follows:

“The original Interpretative Bulletin issued by the Administrator in 1938 used the term ‘retail establishment’ as meaning the same thing as a retail enterprise or business. The revised Bulletin (Interpretative Bulletin No. 6, June 16, 1941) in applying the term retail establishment to a multi-unit company, held that it would not mean that the entire business was a single retail establishment. Section 36 of the revised Bulletin stated that if there was *unity of ownership of all departments in the store and if they were all operated as a single store, the enterprise taken as a whole would be considered an ‘establishment’* within the meaning of Section 13(a)(2). That bulletin also held that warehouses, performing ‘wholesale functions,’ were not included in the exemption. Finally, Interpretative Bulletin, 15 F. R. 7245 (issued after the amendment of Sec. 13(a)(2) in October 1949) specifically held that employees of an exempt retail or service establishment working in a warehouse operated by and servicing such establishment exclusively, are exempt as employees ‘employed by’ the exempt establishment *‘regardless of whether or not the warehouse operation is conducted in the same building as the selling or servicing activities’.*”

Burhans v. Montgomery Ward & Co., 110 Fed. Supp. 184, 196.

The Court also stated that “the defendant was not doing a wholesaler’s business at the warehouse. Part of the local Albany store’s business was done there, and that was a retailing business.” (110 Fed. Supp. 200.)

Appellant concedes the correctness of the *Burhans* case [Tr. 104]. However, it states that it is not applicable

here. Actually, however, it is closely analogous to the facts in this case—much more so than to those in the *Phillips* decision. In both the instant case and in *Burhans* the only difference between the locations comprising the establishment was one of physical location. In the *Phillips* case the significance of separate physical location was not even the question involved.

This case is very persuasive authority for the position urged here by Appellee.

Other cases are similarly persuasive.

Bogash v. Baltimore Cigarette Service (4th Cir. 1951), 193 F. 2d 291, involved a suit for overtime compensation brought by several employees of the defendant company. The business of the defendant was the installation and maintenance of cigarette vending machines. These machines were placed in various locations throughout the area and the employer maintained an office and a warehouse which was used to repair and store machines not in actual use. It was contended by plaintiffs, and the Department of Labor as *amicus curiae*, that the central office and warehouse were not part of a retail establishment but rather constituted a wholesale establishment whose employees therefore did not come within the exemption of 13(a)(2).

In finding that the *Phillips* decision did not apply and that the central office and warehouse did not constitute a separate establishment, the Court said:

“ . . . There is substance in the ruling that chain store systems combine wholesale as well as retail elements into a single system which must be separated in order that the affirmative provisions as well as the exemptions of the statute may be given effect.

But this procedure may not be carried so far by the courts as to divide a genuinely retail business into separate parts, so as to hold that the exemptions apply only to those employees who perform the act of selling. All employees employed by a 'retail establishment' as defined in the statute are covered by the exemption."

Bogash v. Baltimore Cigarette Service, 193 F. 2d 291, 294.

Again, *Montgomery Ward & Co. v. Antis* (6th Cir. 1947), 158 F. 2d 948, *cert. denied*, 331 U. S. 811, 91 L. Ed. 1831, involved the exempt status of employees in a warehouse operated by Montgomery Ward. This warehouse distributed merchandise to four retail stores in the Detroit area out of some 600 operated by the Company, and also performed service and repair functions for the stores and for retail customers. In finding that the employees employed in the warehouse were exempt, the Court said:

" . . . the Phillips decision does not lay down the doctrine that all employees in a building operated as a warehouse are, by reason of that fact alone, within the coverage of the Act. If their employment is in no wise concerned with the wholesaling aspect of the employer's dual or hybrid character as considered in the Phillips case, and they are engaged solely in furthering the activities of retail stores, they may not be within the coverage of the Act,"

Montgomery Ward & Co. v. Antis, 158 F. 2d 948, 951.

In *Duncan v. Montgomery Ward & Co.* (S. D. Tex. 1941), 42 Fed. Supp. 879, the company operated a retail store business in Houston, Texas. Because of limitations

of space in the downtown business area, high rents and the absence of a railroad spur, the company found it necessary for reasons of economy and efficient business operation, to have warehouse space located elsewhere for the storage, handling and stocking of its merchandise. The employees involved were employed at the warehouse performing the usual functions involved in warehousing for a retail store business.

In holding that the retail store, including the warehouse, constituted a single establishment within the meaning of the Act, even prior to its amendment, the Court said:

“The conclusion reached is that Defendant is a retail establishment within the meaning of the second exception quoted [Section 13(a)(2)] notwithstanding the fact that it uses a retail warehouse, purchases some of its merchandise in interstate commerce, ships some merchandise from its retail warehouse to other warehouses in other States, and sells an insignificant amount of its goods (less than 1%) in interstate commerce.”

Duncan v. Montgomery Ward & Co., 42 Fed. Supp. 879, 883.

The Court also held that employees were employed in a local retail capacity within the meaning of Section 13(a)(1) of the Act and therefore exempt.

The foregoing cases are *a fortiori* for Appellee's position here since they involve situations where the warehousing function was to supply and service the retailing part of the establishment. The Alameda warehouse does not service the other warehouses in the division or store goods for such warehouses. For this additional reason it cannot be considered as a separate establishment.

A. The Cases Relied Upon by Appellant Do Not Support Its Position.

The cases cited by Appellant do not support the holding urged by it. Most of the cases involve the same type of situation with which the *Phillips* case dealt; each cited the *Phillips* case as the basis of decision. Most were also decided prior to the 1949 amendments. One was decided before the *Phillips* case decision and reached the same result. Others, in addition, placed emphasis upon the manufacturing or production, as distinguished from the distribution or retail, function.

Walling v. American Stores Co. (3d Cir. 1943), 133 F. 2d 840, was decided prior to the *Phillips* decision. The Court stated the question before it as follows:

“The question is whether the sum total of the activity of the American Stores Company constitutes a ‘retail establishment’ so as to exempt the entire enterprise from the mandate of the statute.”

Walling v. American Stores Co., 133 F. 2d 840, 841.

This case involved eleven warehouses in five states, seven bakeries, two canneries and numerous other businesses, as well as some 2,300 stores. The Court, not surprisingly, reached the same result as was reached in the *Phillips* case, namely, that the entire operation did not constitute a single establishment.

In *Walling v. Goldblatt Bros.* (7th Cir. 1945), 152 F. 2d 475, *cert. denied*, 328 U. S. 854, 90 L. Ed. 1627, the warehouses performing a wholesale function served a chain store system operating fourteen department stores, a drug store and bakery, and the central offices of the system. Again, *Phillips* was quoted extensively and was the basis of the decision. It should also be noted that in

this case the employees of the State Street warehouse, excluding a drapery production shop, were held exempt under Section 13(a)(2). This warehouse principally serviced one of the retail outlets and was located in proximity to it.

In *McComb v. W. E. Wright Co.* (6th Cir. 1948), 168 F. 2d 40, *cert. denied*, 335 U. S. 854, 93 L. Ed. 402, the warehouses and supply yards distributed goods to several retail outlets and housed the general offices and administrative departments. The operation was classified as a "merchandising institution 'of a hybrid retailing wholesale nature' within the rationalization" of the *Phillips* case. Much emphasis was placed upon the wholesale aspects of the warehouses and supply yards.

In *McComb v. Wyandotte Furniture Co.* (8th Cir. 1948), 169 F. 2d 766, two warehouses serviced five retail stores in two states. The Court, upon the basis of the *Phillips* decision, ruled that the warehouses were not part of the retail establishment.

Fletcher v. Grinnell Bros. (6th Cir. 1945), 150 F. 2d 337, involved a wholesale function including a warehouse supplying a number of retail stores. The *Phillips* decision required the same result.

In *Armstrong Co. v. Walling* (1st Cir. 1947), 161 F. 2d 515, the Court found that a commissary department which made, wrapped and delivered sandwiches and related articles to retail outlets in four states was a wholesaling activity as was true in the *Phillips* case which the opinion cited.

In *McComb v. Casa Baldrich, Inc.* (D. Puerto Rico 1948), 80 Fed. Supp. 869, the Court found that a printing plant did not constitute a retail establishment where the defendant had not shown that less than 25 per cent

of its sales were to wholesalers—an administrative criterion under the Act prior to its amendment.

Mitchell v. E. G. Shriner & Co. (7th Cir. 1955), 12 WH Cases 453, involved a company operating 33 retail markets in four states, the Court holding that the central office employees servicing these stores were engaged in commerce and that such employees were not exempt as employees of a retail establishment.

Fred Wolferman, Inc. v. Gustafson (8th Cir. 1948), 169 F. 2d 759, is inapplicable for the further reason that considerable emphasis was placed upon the producing or manufacturing type of activity involved as distinguished from the distribution or retail function. In that case, the employees were employed by a candy kitchen manufacturing candies and salad dressing. These products were supplied to several retail stores. The Court held that they were not exempt under Section 13(a)(2).

A review of the foregoing cases will show that they clearly fall into the Phillips type of category. In addition, some of them involve a producing or manufacturing function which is outside of Section 13(a)(2). They no more require the finding urged by Appellant than does the *Phillips* case; indeed in several of the situations even less. None of these cases stand for the proposition that the Alameda warehouse, separate from the others, constitutes a separate establishment. Indeed, in the various cases, the courts have grouped all of the warehouses and considered them together. These cases would be authority for Appellant only if there were some indication that the courts tended to treat each warehouse building separate from all the rest, and then only if each building was a separate business unit instead of merely part of one. None of the cases support any such result.

IV.

The Interpretation of the Term "Establishment" Under the Various Unemployment Compensation Statutes Supports the Position of Appellee.

A very similar question concerning the meaning of "establishment" is presented under the various state unemployment compensation laws. While the legal question involved is, of course, different, the similarities to the issue in this case are quite clear. The analogy is sufficiently close to provide persuasive authority for the position of Appellee.

In some states these statutes provide in general that employees are not eligible for unemployment compensation if their lack of employment resulted from a labor dispute at the "establishment" where the employee worked. In other states, the statutes refer to the "factory, establishment or other premises" instead of the "establishment" alone. The question has therefore been raised in various cases as to the meaning of these terms.

While the cases reach different results based upon the factual situation involved and place a varying emphasis upon the factors considered, the results strongly confirm Appellee's position. There is no case which we have found which warrants the holding contended for here by Appellant. None holds that a warehouse or other building which is merely part of a business unit or operation function constitutes an "establishment."

In *Spielmann v. Industrial Commission* (1940), 236 Wisc. 240, 295 N. W. 1, the unemployment compensation law did not allow payment of unemployment benefits to an employee if the reason for his lack of work was a labor dispute at the "establishment" where he

worked. The case involved the Nash Company which had two plants 40 miles apart, each of which performed part of the work of building completed Nash automobiles. The operations of the two plants were closely integrated, each performing related functions in the manufacture of automobiles. One built the bodies and the other manufactured other parts and assembled the cars. The hourly rate of production was synchronized. A single manager was in charge of the two plants. The employees in question were out of work at one of the plants because of a strike at the other plant. The Court summarized its view as follows:

“It appears from this summary that although the two plants were forty miles apart, they were just as much a single establishment for the manufacture of automobiles as they would have been had they been in two buildings adjacent to each other, or in separate parts of the same building.”

Spielmann v. Industrial Commission, 295 N. W. 1, 4.

The Court reached this conclusion even though the plants were 40 miles apart, each had its own separate labor union and collective bargaining contract, and its own seniority and service records, the negotiations for working conditions were carried on independently, employees in one plant had no standing in the other, the hiring and discharge functions were separately exercised, and the employment relationship was independent.

In *Chrysler Corporation v. Smith* (1941), 297 Mich. 438, 298 N. W. 87, a similar result was reached. In this case, a strike at the Dodge main plant caused a lack of work in nine other plants in the Detroit area within

a distance of 11 miles of each other. The employees at all of the plants were represented by the same union. It was found that the Company's operations were functionally integrated and synchronized, that the operations of the various plants were controlled from the main plant, that "the central accounting, engineering, export, mailing, production, purchasing, routing and service departments" (298 N. W. 87, 89) were all located in or immediately adjacent to the main plant, although each plant had individual plant managers and engineers who supervised the immediate operations of their respective plants.

The Court held that under these circumstances all of the plants constituted one establishment.

In *Mountain States Tel. & Tel. Co. v. Sakrison* (1950), 71 Ariz. 219, 225 P. 2d 707, the question was whether the 39 exchanges in Arizona operated by the company constituted separate establishments, or a single establishment. It was found that all of the exchanges constitute a single establishment. While the department into which the employees were segregated were separable on a functional, personnel, accounting and direct supervisory basis, they were interdependent to the extent that continued operation of an exchange would be impossible if any one were eliminated. The company's operations were conducted on the basis of a state wide organization and all were subject to central supervision and control. The operations within the state constituted a single unit for rate making and taxing purposes. Billings for local service were handled by a central accounting department and the services were interdependent. All departments were within the various exchange buildings.

In the very recent case of *Snook v. International Harvester Co.* (Ky. 1955), 276 S. W. 2d 658, the question was whether the foundry and machine shop of the company were part of the same establishment. A strike against the machine shop by one union resulted in a layoff of the foundry employees represented by another union. This court in a previous case, *Ford Motor Co. v. Kentucky Unemployment Compensation Commission* (Ky. 1951), 243 S. W. 2d 657, had held that employees laid off at a Kentucky plant were eligible for unemployment compensation even though the reason for the layoff was a strike at the company's plant in Michigan. The decision there was that the two plants, widely separated in two states, did not constitute a single establishment. The Court in the later case, however, drew a distinction upon the ground that the foundry and the machine shop were in the same state and in close proximity. It therefore held that both constituted a separate establishment.

In denying the argument that from the standpoint of employment conditions the foundry and machine shop were separate entities because of a difference in the type of work, terms of employment, immediate supervision and union representation, the Court said:

“ . . . To follow their argument to its logical conclusion, each *employee* would constitute a separate establishment because he is separately employed, works under different conditions, has a different seniority, etc.”

Snook v. International Harvester Co., 276 S. W. 2d 658, 661.

In some cases involving the application of unemployment compensation statutes, the effort was made to have the entire business declared a single establishment, as was

done in the *Phillips* case. As in the *Phillips* case, this contention was rejected and it was determined that an establishment was not necessarily synonymous with an entire business but could also refer to a subdivision or operating unit of a business.

This was true in *Ford Motor Co. v. New Jersey Department of L. & I.* (1950), 5 N. J. 494, 76 A. 2d 256, where a strike took place in Michigan which resulted in a layoff at the New Jersey plants; in *Nordling v. Ford Motor Co.* (1950), 231 Minn. 68, 42 N. W. 2d 576, where a strike at the Dearborn, Michigan plant resulted in a layoff at the St. Paul, Minnesota plant; and in *Tucker v. American Smelting & Refining Co.* (1947), 189 Md. 250, 55 A. 2d 692, where a strike at a mine in Utah caused a layoff at a mill in Maryland. In each of these cases, the statute involved the interpretation of the term "at the factory, establishment or other premises." In each case, not surprisingly, it was held that the widely separated operations were not a single "factory, establishment or other premises."

In the *Tucker* case, a comparison with the facts in the *Spielmann* case is made which is applicable here, namely, that in the *Spielmann* case where the plants were only 40 miles apart there was a "functional integrality," "general unity" and "physical proximity" which was not true in the *Tucker* case where the two plants found to be separate establishments were thousands of miles apart (55 A. 2d 692, 694).

In *Ford Motor Co. v. New Jersey Department of L. & I.*, the Court refers to normal business usage as a consideration (76 A. 2d 260); and also distinguishes between a "far-flung enterprise" as a single industrial unit

and a plant or operational unit. In referring to the *Chrysler* and *Spielmann* cases *supra*, the Court said:

“ . . . There, ‘establishment’ alone was used to define the statutory class; and there were geographical proximity and other factors which in the judgment of the court made the totality of members one ‘establishment,’ so that a labor dispute at one plant would include all as a unitary whole.”

Ford Motor Co. v. New Jersey Department of L. & I., 76 A. 2d 256, 261.

The Court in the *Nordling* case held that functional integrality, general unity and physical proximity are factors that should be taken into consideration in determining the ultimate question of whether a factory, plant or unit of a major industry is an establishment separate from the business as a whole. It stated, however, that they were not the only factors. The Court held an important factor to be whether the operation is separate or unified in so far as the employees and employment conditions were concerned (42 N. W. 2d 587).

In the instant case, of course, all of these tests are met by the East Los Angeles division rather than by the Alameda warehouse alone. Hiring and discharge are on a division basis. There is a single union and any strike action, if not on a company-wide basis, presumably would be at least on a division basis. Seniority rights apply throughout the division, not to the Alameda warehouse alone. The employees regularly interchange between the various warehouses. Unemployment compensation payments are made, for all employees of the Division, indeed for the Company as a whole, not just for the Alameda warehouse.

In *Tennessee, Coal, Iron & R. Co. v. Martin* (1948), 251 Ala. 153, 36 So. 2d 547, it was held that coal mines owned and operated by the company constituted an establishment separate from the steel mills and ore mines operated by the same company. The Court determined that the seven criteria referred to in the *Spielmann* case were of value "as indicating the true nature of the operational set up of a manufacturing business. If these factors are not of importance, then just what elements would furnish light as to the true situation?" (36 So. 2d 547, 551.)

In *General Motors Corporation v. Mulquin* (1947), 134 Conn. 118, 55 A. 2d 732, the question involved whether two plants located eighteen miles distant from each other constituted a "factory, establishment or other premises." The Court's statements in deciding this question are most relevant:

" . . . In its customary acceptance, a factory is a building or group of buildings used in connection with each other for the common purpose of manufacturing articles, usually, but not necessarily, in the same inclosure or same immediate neighborhood. (*Liebenstein v. Baltic Fire Ins. Co.*, 45 Ill. 301, 303.)"

* * * * *

" . . . The solution is not to be found merely in its physical isolation from Bristol, a circumstance which, as their memorandum indicates, the commissioners deemed decisive. Geographical separation is important but is by no means controlling. *Where, as here, a manufacturing corporation carries on its business in buildings at different localities, the test is whether they are so operated as to constitute a*

single unit; if so, they amount to a single factory. The application of this test requires a consideration of many factors, such as the scheme of management, supervision and production of each plant; that is, whether or not those locally in immediate charge, let us say, of the one plant, are subject to the authority of those operating the other, as distinguished from their being under the control of policy-framing officials ranking higher in the pyramid of the corporate structure. Consideration should likewise be given to the source of authority in hiring, paying and discharging employees, to the methods of making purchases and sales, to the manner of handling accounts, and to all other relevant and kindred matters. . . .”

General Motors Corporation v. Mulquin, 55 A. 2d 732, 736, 738.

The foregoing cases therefore all stand for the proposition akin to that enunciated in the *Phillips* case, that the term “establishment” is not necessarily the same as the entire business entity, with ultimate management or common ownership the criterion, but that separate divisions or separate functions can be separate establishments. Not one of the above cases, nor indeed any case we have found, has held that a separate building comprising only part of an operating unit of the company, without any organizational or employment identity other than its separate location, constitutes a separate establishment.

All of the cases refer to operating, functional or employment units, plants, or places of business. They refer to customary and usual business practices and to factors which are entirely absent in the instant case. Thus, reference is made to employment, hiring and dis-

charge practices, union representation, record keeping practices, supervisory practices, interchange of employees seniority, management and operating practices, functional similarity, and so on. If a significant number of these practices and functions are common to a particular business unit, that fact has been persuasive in finding such unit to constitute an establishment. We have found no case which has found an establishment to exist where none or only an insignificant few of these factors are applicable. In the instant case not one applies to the Alameda warehouse. On the other hand, substantially all apply to the East Los Angeles Division.

As a result the Alameda warehouse is not an establishment within the meaning of Section 13(a)(2). On the contrary, upon the basis of all the tests, the Division is the smallest unit of the Company which can be termed an establishment.

For the foregoing reasons we urge the Court to affirm the judgment of the Court below dismissing the Complaint.

Respectfully submitted,

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No. 14618

**In the United States Court of Appeals
for the Ninth Circuit**

**JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, APPELLANT**

v.

**BEKINS VAN & STORAGE COMPANY, A CORPORATION,
APPELLEE**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DI-
VISION**

REPLY BRIEF FOR APPELLANT

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INDEX

CITATIONS

	Page
Cases:	
<i>Alstate Construction Co. v. Durkin</i> , 345 U. S. 13.....	12
<i>Chrysler Corp. v. Smith</i> , 297 Mich. 438, 298 N. W. 87.....	10
<i>Farmers Reservoir and Irrigation Co. v. McComb</i> , 337 U. S. 755	10
<i>Kirschbaum Co. v. Walling</i> , 316 U. S. 517.....	11
<i>Maneja v. Waialua Agricultural Co.</i> , 75 S. Ct. 719.....	12
<i>Mitchell v. C. W. Vollmer & Co., Inc.</i> , 75 S. Ct. 860.....	11
<i>Overstreet v. North Shore Corp.</i> , 318 U. S. 125.....	11
<i>Phillips Co. v. Walling</i> , 324 U. S. 490.....	1, 3, 5, 9, 10
<i>Roland Electrical Co. v. Walling</i> , 326 U. S. 657.....	6
<i>Schwegmann Bros. v. Calvert Distillers Corp.</i> , 341 U. S. 384..	6
<i>Spielman v. Industrial Comm.</i> , 236 Wis. 240, 295 N. W. 1..	10
<i>Tobin v. Aibel</i> , 112 F. Supp. 156, affirmed, 204 F. 2d 376.....	9
<i>Walling v. A. H. Phillips</i> , 50 F. Supp. 749.....	4
Statutes:	
Fair Labor Standards Act of 1938, as amended:	
Section 3(j)	10
Section 13(a) (2)	2, 3, 5, 6, 7, 8, 9, 10
Fair Labor Standards Amendments of 1949:	
Section 16(c)	11
Miscellaneous:	
Interpretative Bulletin, "Retail and Service Establishment and Related Exemptions," 29 CFR (1955 Supp.) 779; 15 F. R. 7245	6
95 Cong. Rec. 11115-11116	6, 7
95 Cong. Rec. 12490-12503	6
95 Cong. Rec. 12505	6
95 Cong. Rec. 12506	7
95 Cong. Rec. 14877	6
95 Cong. Rec. 14880	6
95 Cong. Rec. 14931	7
95 Cong. Rec. 14931-14932	6
95 Cong. Rec. 14942	6
29 CFR 617	9

In the United States Court of Appeals
for the Ninth Circuit

No. 14,618

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, APPELLANT

v.

BEKINS VAN & STORAGE COMPANY, A CORPORATION,
APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DI-
VISION*

REPLY BRIEF FOR APPELLANT

Appellee's brief goes beyond the single issue presented for decision in this case. It reflects, moreover, a misunderstanding of the opposing positions taken in *Phillips* (324 U. S. 490) and the Supreme Court's holding in that case, as well as a misconception of the plain terms and legislative history of the statutory provision here involved. For these reasons, this reply brief is deemed necessary.

1. The issue in this case is still the narrow question whether appellee's Alameda warehouse is a separate

“establishment” within the meaning of Section 13(a)(2) of the Fair Labor Standards Act. Appellee’s assertions that “* * * whether the warehousing service is to commercial users or non-commercial users is irrelevant” (br. p. 24) and that “Not one of the references in the amended section would apply to the Alameda warehouse” (br. p. 19), are plain misstatements of the case before this Court for decision and serve only to confuse. Apparently appellee is ignoring the plain import of the stipulations and findings in the court below.

Appellee stipulated:

It is agreed and the Court may accept as established fact without further proof that the percentage tests of Section 13(a)(2) of the Fair Labor Standards Act of 1938, as amended, are satisfied if the East Los Angeles Division is a single “establishment” within the meaning of Section 13(a)(2), the business activities of which are considered together as a unit, but that such tests are not met in the case of Alameda if Alameda alone is a single “establishment” within the meaning of Section 13(a)(2), the business activities of which are considered separately as a unit. (Stip. XII, R. 18)

Appellee’s counsel also admitted in open court that Alameda did not meet the tests prescribed by the statute (R. 107-8). On the basis of this stipulation and appellee’s admission in open court, the trial court found “Such tests [Section 13(a)(2)] are not met in the case of the Alameda warehouse considered separately” (Fdg. 2, R. 34). This, we submit, forecloses argument on that issue and appellee cannot now be heard to say

that Alameda's status under the tests prescribed in Section 13(a)(2) is unascertainable.

2. Appellee has completely misconceived the opposing positions taken in *Phillips*, as well as the Supreme Court's holding in that case. We contended there, just as we contend here, that "each distinct physical unit of petitioner's [appellee's] organization is a separate establishment" (Govt.'s br., p. 12). Our position was based on the meaning of the term "establishment" as Congress used it in Section 13(a)(2) of the Act, as it is normally understood, and as it had been used in government and business prior to the Act's passage.

The legislative history on which we relied is summarized in the *Phillips* decision and need not be repeated here. See 324 U. S. 497, n. 7. The decision also summarizes what we had to say about the use of "establishment" in government and business. See 324 U. S. 496, n. 6. As to the normal meaning of the term, we pointed out that it "connotes 'a place of business or a building or location where business is conducted' "; and that "While there are looser senses in which the term may sometimes be used, its primary commercial and mercantile connotation is one of *locus*, not of enterprise or organization," citing Webster's New International Dictionary (2d ed., 1934) ; 16 Cyc. 593; 30 C. J. S., p. 1234; Black's Law Dictionary (3d ed.) (Govt.'s br., p. 6, 10-11).

In no part of our written or oral argument of the case did we rely on Phillips' organizational structure to support our position. On the contrary, the net effect of our argument was that organizational structure was immaterial. And this was the net effect of the Supreme Court's holding, as is plainly indicated in its recognition

of the organizational integration of the separate units of Phillips' enterprise.

Phillips, on the other hand, contended that the operations of its central office and warehouse were so closely integrated with those of its stores that all of them together constituted a single "retail establishment." Contrary to appellee's assumption (br., p. 34), Phillips relied on its central management, administrative organization and record-keeping practices in an effort to support its contention. Thus, in its Supreme Court brief (p. 2), it pointed out that its 49 retail stores were "all within a radius of thirty-five miles of Springfield"; and its warehouse, located in Springfield, "serves all of these stores;" and that the "business office of the company, * * * likewise located in Springfield, * * * performs all of the usual office work in connection with the entire business, except such sales records as originate in the stores themselves before transmittal to the office".¹ Indeed, like appellee here, it argued that "the sales outlets, the warehouses and office are as much an establishment as if all these activities were confined in one building" (Phillips' Supreme Court br., p. 12); and

¹ Phillips' summary of how it operated was fully supported by the record, which showed that all merchandise for the stores, except bread, milk, and pastry, passed through the warehouse; that the central office kept the inventory records for each store and recorded transfers of goods from one store to another; that all the stores were serviced by a single fleet of trucks operating out of the warehouse; that the stores were divided into three groups and each group was supervised by a superintendent working out of the central office; that the superintendents not only revised requisitions for goods prepared by the store managers but even collected their daily cash receipts and deposited them in the company's bank account; that the work of checking invoices, deliveries and store credits, paying bills, and preparing payrolls for all employees (warehouse, office, and stores) was all done in the central office. See the findings of the trial court, 50 F. Supp. 749-752.

that “Whether or not an establishment, great or small, is a ‘retail establishment’ depends, *not on the physical location of its units*, but on the character of its business” (*Id.*, p. 11; emphasis added).

As the decision plainly shows, the Supreme Court rejected Phillips’ argument and accepted the Government’s instead. In so doing, the Court recognized that the functions of the central office and warehouse were “completely meshed” with those of the stores (324 U. S. 494-495). The functions were “integrated”, said the Court, but “*physically* distinct” (*Id.*, at 495; emphasis added); and this fact was specifically held to be the “essential key to the problem” (*Id.*, at 496). Therefore, although the “prime function of petitioner’s chain store system [was] to sell groceries at retail”, and although the warehouse and central office were “vital factors in this integration of the retail and wholesale functions,” the Court nevertheless held that the Phillips’ enterprise was composed “of 49 retail establishments and a single wholesale establishment” (*Id.*, at 494, 496).

It is, therefore, difficult to fathom appellee’s argument that the word “physical” in the Supreme Court’s definition of establishment, “as meaning a distinct physical place of business,” is merely dictum.

3. Appellee’s contention that the 1949 amendment to Section 13(a) (2) and its legislative history support the conclusion that Alameda is not a “separate establishment”, results from a distorted and illogical interpretation of both the amendment and its legislative history. The amendment in no way effected a change in the definition of “establishment” as laid down by the Supreme Court in *Phillips v. Walling*, 324 U. S. 490. As

pointed out in our main brief (pp. 22-24), Congress expressly adopted the Supreme Court's definition.

It is unmistakably clear from the legislative history of the 1949 amendment that Congress did not intend to change or expand the basic scope of the Section 13(a)(2) exemption.² The sponsors³ of the amended language repeatedly and emphatically disavowed any intent to change or expand the basic scope of the exemption. Senator Holland, the sponsor of this amendment, described it as simply "a clarification" of a relatively minor aspect of the exemption—to prevent a sale from being classified as nonretail merely because it was for business rather than for personal consumer use. Pointing out that the Supreme Court's decisions had "cast considerable doubt upon the application of the exemption to any retail or service establishment * * *, making some sales to business users," Senator Holland explained the limited purpose of the amendment as follows:

² The complete congressional debates and reports on the 1949 amendment to Section 13(a)(2) are too extensive for inclusion in this reply brief. For a more complete discussion see: 95 Cong. Rec. 11115-11116; 12490-12503; Report of Senate Conferees, 14877; Statement of Senator Taft, 14880; Statement of House Managers, 14931-14932. See also Interpretive Bulletin, "Retail and Service Establishment and Related Exemptions", 29 CFR (1955 Supp.) 779; 15 F.R. 7245.

As to appellee's statement that *Roland Electrical Co. v. Walling*, 326 U.S. 657, was "specifically overruled" (br. p. 25), see Senator Holland's statement that the answer to that question was "*Definitely not*" (95 Cong. Rec. 12505, emphasis added), and Representative Lesinski's statement that "* * * the reference to [*Roland, supra*] should not mislead anyone into concluding that the conferees intended to reverse or nullify that decision (95 Cong. Rec. 14942; emphasis added).

³ "It is the sponsors that we must look to when the meaning of the statutory words is in doubt." See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395.

The amendment clears up that doubt by exempting the establishments which are traditionally regarded as retail. It is *only in the sense that it clarifies such doubt that the amendment can be regarded as expanding the present exemption. But in a real sense it is not expanding the exemption at all* but simply confirming it for those establishments which the Congress always intended to exempt [95 Cong. Rec. 12506; emphasis added].

The identical explanation was made by Representative Lucas, sponsoring the amendment in the House of Representatives, 95 Cong. Rec. 11115-11116 (1949). The House Managers' Report, as appellee recognizes (br. p. 25), confirms this limited purpose of the amendment.

This clarification is needed in order to obviate the sweeping ruling of the Administrator and the courts that no sale of goods or services for business use is retail. See *Roland Electrical Co. v. Walling* (326 U. S. 676); *McComb v. Diebert* (E. D. Pa. 1949), 16 Labor Cases Par. 64, 982; *McComb v. Factory Stores* (81 F. Supp. 403 (N. D. Ohio 1948)) [95 Cong. Rec. 14931 (1949)].

It is thus plain that the sole purpose of the amendment was to make it clear that establishments traditionally regarded as retail would be exempt even though some of their sales or services might be nonretail in nature. This was done by prescribing percentage tests. Admittedly, those tests are not met in the case of Alameda.

Section 13(a)(2), by its clear and unequivocal terms, contemplates the following procedure in ascertaining

the applicability of the exemption. First, determination of the “establishment” for which the exemption is sought (the issue here), and second, application of the prescribed tests to the sales of the “establishment” as thus determined.

Appellee contends that the amendment makes the accounting practices and business organization of a company determinative of what is an “establishment.” It argues that the amendment “requires an analysis of the *company’s* business organization and practices” and that “consideration must be given to the operational, financial and accounting organization of the *business*” (Br. p. 35; emphasis added). It will be noted that nowhere in Section 13(a)(2) are the terms “company” or “business” used. The section speaks solely in terms of “establishment,” and the tests are stated in clear objective terms. In sum, what appellee argues, despite protestations to the contrary, is that an enterprise may determine for itself by its administrative practices what constitutes an “establishment”, and then the tests are to be applied to whatever segment of the enterprise (here five warehouses and a central office) the company wishes to label as an “establishment”.⁴ This clearly is contrary to the terms of the exemption and its expressed legislative intent. The administrative organization of a company is in no wise determinative of the “establishment” issue. That issue must be independently resolved in accordance with the criteria laid down

⁴ Appellee has chosen to label its multi-unit East Los Angeles Division as the basic unit, i.e., “establishment,” and appears to infer that this division has been in effect for half a century. The record shows that until 1938 all the warehouses in metropolitan Los Angeles were operated without divisional distinctions. At that time the city was divided into two areas and the East Los Angeles Division came into existence (R. 66).

in *Phillips* and the cases decided thereunder, which appellee concedes were correctly decided.

4. Appellee's reliance on *Tobin v. Aibel*, 112 F. Supp. 156, affirmed *per curiam*, 204 F. 2d 376 (C. A. 2), is plainly misplaced. The issue there was not the meaning of "establishment" in the context in which it is used in the Section 13(a)(2) exemption from the Act, but in a completely different context under an administrative regulation designed to protect the Act's standards by prohibiting the exploitation of homeworkers in the Knitted Outerwear Industry. The regulation broadly defined the Knitted Outerwear Industry for the very purpose of including all operations in it, regardless of the division of parts of the industry among particular employers. Thus, it covered not only "knitting" but the "further manufacturing, dyeing or other "finishing" of articles of knitted outerwear which are "partially or completely manufactured in the same establishment as that where the knitting process is performed" (29 C.F.R. 617).

The defendants in the case (a man and his wife) were engaged in the production of hairnets which are made from a knitted fabric. They sought to avoid the regulation by dividing the work between two legal entities (a corporation and a partnership) and by designating a physically separate location for the distribution and collection of the homework. The issue in *Aibel* was whether the court would disregard the corporate entity and treat the family corporation and the family partnership as a single establishment for purposes of the regulation. In other words, would the court permit the defendants to evade the Administrator's regulation by the simple device of arbitrarily dividing the operations between two formal legal entities, both of which they op-

erated and controlled, and designating as an establishment a physically separate place for the distribution and collection of the homework. The decision to disregard the physical separation of the distribution point was thus no more than a refusal to permit evasion of the plain purpose of the regulation. That decision clearly has no relevance in determining the meaning of “establishment” as used in a wholly different context in the Section 13(a)(2) exemption. Even words in the statute itself do not mean the same thing each time they appear. See *Farmers Reservoir and Irrigation Co. v. McComb*, 337 U.S. 755, where the Supreme Court specifically refused to give the word “produced” in the agriculture exemption the same broad meaning which it has for coverage purposes in Section 3(j).

5. The interpretation of the term “establishment” under the various state unemployment compensation statutes does not provide, as appellee contends, persuasive authority for its position. Even if it be assumed that the broad interpretation of the term “establishment” was warranted in the cases cited by appellee, the policy of the unemployment compensation statutes involved in those cases and the context of the word “establishment” in those statutes are quite different from the statutory policy and context of the term here. In the *Phillips* case, petitioner relied on both *Chrysler Corp. v. Smith*, 297 Mich. 438, 298 N. W. 87, and *Spielmann v. Industrial Comm.*, 236 Wisc. 240, 295 N. W. 1, cited by appellee here, in the Circuit Court and in the Supreme Court, as did the American Retail Federation, *amicus curiae* in the Supreme Court.⁵ The Supreme

⁵ See Briefs for A. H. Phillips, Inc., Circuit Court Br. pp. 4-5; Supreme Court Br. pp. 7-8; American Retail Federation Br. p. 18.

Court rejected the interpretation of “establishment” in those decisions and approved the Government’s that the term means “a distinct physical place of business.”

The Supreme Court, moreover, has repeatedly cautioned against interpreting this Act in accordance with principles laid down in cases arising under other Federal statutes which, though “similar”, are not “strictly analogous.” *Overstreet v. North Shore Corp.*, 318 U.S. 125, 131. This has been the Court’s view from one of its earliest decisions under the Act (*Kirschbaum Co. v. Walling*, 316 U.S. 517) to its latest (*Mitchell v. C. W. Vollmer & Co., Inc.*, decided June 6, 1955, 75 S. Ct. 860. If cases arising under “similar” Federal statutes are not pertinent, it cannot be gainsaid that cases arising under dissimilar State statutes are clearly inapposite.

6. Appellee’s reference to the “powerful” Teamsters Union is obviously for the purpose of coloring the case. The Act’s overtime provisions apply to union and non-union employees alike. And as appellee itself recognizes, union contracts cannot take precedence over the statutory requirement of time and one-half compensation for hours worked in excess of 40 a week (br., p. 38).

7. We pointed out in our main brief, pp. 22-23, that the Government’s interpretation of “establishment” was outstanding in 1949 when Congress not only approved it by approving Phillips, but provided in Section 16(c) of the Fair Labor Standards Amendments that all administrative interpretations in effect and not inconsistent with the Amendments “shall remain in effect.” We now wish to call attention to the fact that the Supreme Court has recently relied upon Section 16(c) to uphold two prior administrative interpreta-

tions of the Act. See *Maneja v. Waialua Agricultural Co.*, decided on May 23, 1955, 75 S. Ct. 719, 728; *Alstate Construction Co. v. Durkin*, 345 U.S. 13, 16-17. The interpretations in both of the cited cases, though outstanding in 1949, were "new" in that they represented a change in position. Here, however, it has been the consistent administrative position ever since the Act's passage that "establishment" means a "distinct physical place of business." The *Alstate* and *Waialua* rulings, therefore, *a fortiori* apply here.

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